

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OTOMBEY TRAIL, [REDACTED] 422

No. [REDACTED] 134

AUGUST DANIELS PLAINTIFF IN ERROR

THE STATE OF IOWA

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA

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FILED AUGUST 1, 1911

(28,400)

(28,400)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 445.

AUGUST BARTELS, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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a Filed Jul. 26, 1921. B. W. Garrett, Clerk Supreme Court.

In the Supreme Court of the State of Iowa.

AUGUST BARTELS, Plaintiff in Error,

vs.

THE STATE OF IOWA, Defendant in Error.

*Stipulation.*

The parties in this cause, by their attorneys, agree that the following portions of the record shall constitute the transcript of the record in the pending writ of error to the Supreme Court of the United States, to-wit:

1. This Stipulation.
2. The appellant's abstract of record.
3. The opinion, dissenting opinion, and judgment of the Supreme Court of Iowa.
4. Notice of Intention to Petition for Rehearing (including the return and acknowledgment of service and date of filing the same in the office of the Clerk of the Supreme Court of Iowa).
5. The plaintiff in error or appellant's petition for rehearing (including the date of filing the same in the office of the Clerk of the Supreme Court).
6. All orders and entries of record in this cause in the Supreme Court of Iowa, including decision and ruling upon the petition for rehearing and date thereof.
7. Petition for Writ of Error and allowance thereof.
8. Assignment of Errors including date of filing in the Supreme Court of Iowa.
9. Bond and approval thereof.
10. Prayer for Reversal and Allowance of Writ of Error.
- b 11. The Writ of Error, Citation and service thereof.
12. Citation in Error and service thereof.
13. Certificate of the Clerk of the Supreme Court of Iowa to said transcript.

The Clerk of the Supreme Court of Iowa is accordingly requested to transmit only the papers designated in this stipulation.

CHARLES E. PICKETT,  
PICKETT, SWISHER & FARWELL,  
F. P. HAGEMANN,

*Attorneys for Plaintiff in Error*

BEN J. GIBSON,

*Attorney General,*

*Attorneys for Defendant in Error*

1 Filed March 18, 1920. B. W. Garrett, Clerk Supreme Court

In the Supreme Court of Iowa, May Term, 1920.

STATE OF IOWA, Appellee,

vs.

AUGUST BARTELS, Appellant.

Criminal.

Appeal from Bremer County District Court.

Hon. M. F. Edwards, Judge.

H. M. Havner, Attorney General,

F. C. Davidson, Assistant Attorney General,

W. H. Wehrmacher, County Attorney,

*Attorneys for the State.*

Pickett, Swisher & Farwell, and

F. P. Hagemann,

*Attorneys for Appellant.*

#### APPELLANT'S ABSTRACT OF RECORD.

We, the undersigned attorneys for the state, appellee, hereby accept due and legal service of the within abstract of record and acknowledge receipt of copies thereof this 18 day of March, 1920.

H. M. HAVNER,

*Atty. General;*

F. C. DAVIDSON,

*Asst. Atty. Gen'l;*

W. H. WEHRMACHER,

*County Attorney,*

*Attorneys for the State, Appellee.*

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On January 7, 1920, the State of Iowa filed information before M. M. Kingsley, Justice of the Peace in and for the 1st Township, Bremer County, Iowa, charging the defendant with the crime of using a language other than English as the medium

### Information.

vs.

ore M. M. Kingsley, Justice of the Peace in and for Waverly Township, Bremer County, Iowa.

E. H. RAUSCH.

Subscribed and sworn to by E. H. Rausch, before me this 7th day  
January, 1920.

M. M. KINGSLEY,  
*Justice of the Peace.*

Warrant was duly issued by the said Justice for the arrest of the defendant. He was arrested and brought into court and pleaded guilty.

Thereupon evidence was taken in the Justice Court and trial had upon the information, the defendant being represented by F. P. Hagemann, his attorney, and the judgment of the Justice Court was, as follows:

The court finds the defendant is guilty of the crime charged in information, and it is ordered, adjudged and determined that defendant pay a fine of \$25.00 and the costs of this action taxed 4.00."

appeal bond was fixed at \$100.00.

hereupon, the defendant gave notice in open court of appeal to district court of Bremer County, Iowa, and furnished the above

appeal bond which was approved by the Justice and was admitted to bail.

On January 7, 1920, the said Justice filed in the office of the Clerk of the District Court of Bremer County, Iowa, a transcript of the above case and returned and filed in said court all of the original papers and documents belonging to the said action.

#### *The Transcript.*

The transcript shows the filing of the information in the Justice Court, the issuance of the warrant, the arrest of the defendant, his plea of not guilty, the trial in the Justice Court, and the judgment of the court finding him guilty of the crime charged, and judgment imposing a fine of \$25.00 and costs taxed at \$4.00, the notice of appeal given in open court to the district court, the requirements of appeal bond and the furnishing of the bond, and proper certificate is attached to the transcript.

#### *Proceedings in the District Court.*

On January 22, 1920, the cause came on for hearing in the district court by way of appeal by the defendant from the judgment rendered against him in the aforesaid Justice Court.

#### *Plea of the Defendant.*

The defendant, being represented in court in person and by his counsel, ~~pleaded not guilty~~ to the offense charged in the information. All parties waived trial to a jury.

#### *State's Evidence.*

The State then introduced in evidence an agreed statement of facts, as follows:

5 It is stipulated between the State of Iowa and August Bartels, defendant, that the following is a true and correct statement of the facts involved in the case, and that the case shall be tried and determined upon said facts without the introduction of any other testimony therein, said facts being as follows, to-wit:

First. That St. John's Evangelical Lutheran Church is a rural church located in Maxfield Township, Bremer County, Iowa; that the church corporation owns and uses a church edifice and parochial school building and other property in connection therewith of the reasonable value of approximately \$40,000, and at the present time has a congregation of approximately three hundred with two hundred communicants; that it is a religious organization affiliated with the Evangelical Lutheran Synod of Iowa and other states, and that the said church and its parochial school have been continu-

ously supported and maintained by the members for religious purposes in accordance with the beliefs and practices of the said Evangelical Luther Synod of Iowa and other states. That among the beliefs and practices of the said church and the Synod with which it is affiliated is the belief and practice of having the children of the members and communicants attend its parochial school until after their confirmation and acceptance into the church as communicants thereof, and that the object and purpose of the parochial school is to give the said children of the members and communicants a Christian education in the catechism, beliefs and practices of the said church at the same time that they are receiving their secular education in the common branches, and to conduct daily in said school devotional exercises in accordance with said beliefs and practices.

Second. That the children attending said school are the children of the communicants and members of the aforesaid church, and that the present school attendance is, and for some years has been, approximately thirty-six pupils, of the ages between six and thirteen years, both inclusive; that the said parochial school is in session thirty six weeks of five days each, with school hours from nine o'clock A. M. to twelve noon, and from one o'clock P. M. to four o'clock P. M. each school day, beginning about the middle of September and ending about the middle of the following June, with the ordinary holiday vacations; that ordinarily the children of the school are confirmed and received into the church on attaining the age of thirteen years, at which time said pupils are expected to, and as a rule, have completed the seventh grade in the common school branches mentioned in paragraph three hereof, and that as a rule the pupils of the school, after completing the seventh grade and being confirmed, attend the public schools in the same community, entering the eighth grade of the said public schools; that the school year in the parochial school is a month or more longer than is the school year in the public schools of the same community.

Third. That the secular branches taught in said parochial school, to-wit, the common school branches of reading, writing, spelling, arithmetic, grammar, geography, American citizenship, physiology and United States history, are taught and, for a number of years, have been taught in the English language with English as the medium of instruction; and that the text books used in said subjects are the same text books used in the public schools in said community, and that the instruction given in the aforesaid common branches is equivalent and, in all respects, is substantially the same as the instruction given in the said common branches in the public schools in said community.

Fourth. That the defendant, August Bartels, is the duly appointed, employed and acting teacher of the aforesaid parochial school, and has been the teacher of said parochial school continuously during the last five years; that said defendant is a competent teacher possessing the necessary qualifications and moral character for that purpose.

Fifth. That the members and communicants of the aforesaid church and the children attending the aforesaid parochial school are of foreign extraction; that all of said members and communicants, whether immigrants, or born in this country, and this defendant and the children attending the parochial school, are citizens of the state of Iowa and of the United States, either by reason of their birth in this country, or by reason of their naturalization or the naturalization of their parents, as, and in the manner, provided by law.

Sixth. That the members and communicants of said church have always been accustomed to worship in the church and have devotional exercises in the home in the German language and that the devotional exercises and religious instruction of the children in said parochial school for many years was exclusively in the German. During recent years religious instruction in the said parochial school has been and is now given in both the English and German languages. This instruction has been given in this way in order that the children might be able to participate intelligently with their parents in religious worship in the home and in the church. It is done also for the purpose of enabling the parents to supplement the religious instruction of the school by instruction in religions and morals in the home. It is the desire of the parents of the children who are in attendance at said school that their children be given instruction in religious matters in the German language and that the children acquire a sufficient knowledge of the German language to enable them to read intelligently the church catechism and the Bible in the German.

Seventh. That a part of the communicants and members of the aforesaid church have insufficient knowledge of the English language to freely and clearly receive or impart instruction in the matter of religion and morals, or to take part with the same freedom and the same understanding in religious or devotional exercises conducted in the English language that they would in the German; that among the duties enjoined by said church and which are the beliefs and practice of the communicants of said church whose children are now attending the aforesaid parochial school, are the duties of assembling with the members of their families and attending at stated periods devotional services conducted in the home and of attending with their children religious services conducted in said church, consisting of sermons, instruction in matters of faith and religion, the singing of hymns and other religious and devotional exercises usual in Protestant Christian churches. That knowledge of the catechism is essential to confirmation in the church and that it is the belief of the members and communicants of said church, whose children are now attending the aforesaid parochial school, that the training of their children in religion and in Christian citizenship will be materially and irreparably interfered with unless the said children learn to read the language used by the parents in worship in the church and the home. That it is the belief of the said church and the members and communicants thereof, that children should



be prepared for confirmation at about the time they complete the seventh grade in the secular branches, or when they have attained the age of thirteen years. It is also the belief of the members and communicants of the said church that parents will not be able to perform their full Christian duty toward their children in accordance with the beliefs and practices of the church if they are unable to supplement the religious training of their children through admonitions and worship at the home conducted by the parents in the German language in which they are accustomed to worship.

Eighth. That on November 10, 1919, and upon each school day during the present school year beginning about the middle of September, 1919, up to the time of the filing of the information in this case, the defendant, August Bartels, in addition to teaching through the medium of the English language the common school branches mentioned in paragraph three hereof, (including among said common school branches, English reading by the use of English text books) did teach in said parochial school reading in the German language to the pupils of said school, to-wit: Selma Steege, Cordelia Griese and Lawrence Phipo, and to the other pupils in said school whose names are not herein set out. That the said pupils to whom reading was taught in the German language were of the ages between six and thirteen years, inclusive, and were below the eighth grade. That ordinary German school readers appropriate to the advancement of the respective pupils were used in said school. German was used as the medium of instruction by the defendant in teaching reading of the German language. That said German reading was taught at the request and with the full consent of the parents of said children and for the purpose of teaching the said children to read the German language sufficiently to enable them intelligently to read the catechism and Bible in that language and to understand religious instruction when given in said language and to take part in religious services conducted in said language in the church and Sunday School and in the home.

Ninth. That the whole of the above statement of facts, or any part thereof, at the time of the trial, may be objected to upon the grounds of irrelevancy and immateriality, or for the reason that the same is an opinion or a conclusion.

H. M. HAVNER,  
*Attorney for State of Iowa.*

F. P. HAGEMANN AND  
PICKETT, SWISHER & FARWELL,  
*Attorneys for Defendant.*

11 The State further introduced in evidence an amendment to said stipulation of facts, as follows:

Come now the parties to the above entitled cause and amend the stipulation of facts, as follows:

Strike from paragraph numbered Eight of the Stipulation the following words:

"That ordinary German school readers appropriate to the advancement of the respective pupils were used in said school."

and in lieu thereof, insert:

"That the text books used in teaching reading in the German language to said pupils were printed in the German language and contained such reading lessons as ordinarily appear in elementary reading text books printed in the English language and used in the public schools of the state, and are hereby admitted to be of a secular character rather than of a religious character."

It is further stipulated that no objection is to be interposed to the above agreement of facts because the readers themselves are not introduced in evidence.

The above stipulation of facts and the amendment thereto were also filed with the Clerk, and both parties then rested.

*Motion for Directed Verdict or Dismissal of the Case.*

Thereupon the defendant filed the following:

12 Comes now the defendant and moves the court to direct a verdict in his favor or to dismiss the above entitled case on the ground that the stipulation of facts filed herein shows that the defendant is not guilty of the crime charged or of any crime under the laws of the State of Iowa, for the following reasons:

1. That Chapter 198 of the Acts of the 38th General Assembly of the State of Iowa, which the defendant is claimed to have violated, is unconstitutional and void in that:

(a) The acts therein prohibited as applied to the case at bar interfere with the liberty, property, safety and happiness guaranteed the defendant and the pupils to whom he is alleged to have taught, reading in the German language by Article 1, Section 1 of the Constitution of the State of Iowa.

(b) That the said purported law prohibits the free exercise of religion within the meaning of Section 3 of the Article 1, of the Constitution of the State of Iowa, and is, therefore, void.

(c) The acts complained of as disclosed by the stipulation of facts filed herein are merely the exercise of rights retained by the people under Section 25 of Article 1 of the Constitution of the State of Iowa, and, that, therefore, the said statute is void and unconstitutional.

2. That the aforesaid statute, to-wit, Chapter 198 of the Acts of the 38th General Assembly, under which the information was filed herein, is unconstitutional and void in this:

(a) That it deprives the defendant and the pupils that he was teaching reading in the German language of their rights, liberty and property within the meaning of Section 1 of Article XIV of the Constitution of the United States, and

13 (b) The acts complained of herein and inhibited by said statute are among the rights retained by the defendant and citizens of the United States by Article IX of the Constitution of the United States, and that the said statute is therefore void because of the constitutional provisions of the federal constitution.

3. That the provision occurring in Chapter 198 of the Acts of the 38th General Assembly of Iowa, reading "and the use of any language other than English in secular subjects in said schools is hereby prohibited" is void and unconstitutional in that the subject matter thereof is not contained in the Title as required by Section 29 of Article III of the Constitution of the State of Iowa.

4. That the acts of the defendant disclosed in the stipulation of facts are not inhibited by the aforesaid Chapter 198 of the Acts of the 38th General Assembly of the State of Iowa in that said acts are not within the letter and spirit of the law.

5. That under the undisputed facts in this case the teaching of reading to said pupils in the German language is a part of the religious instruction given in said school and in no wise a part of their secular education.

6. The constitutionality of the statute, viz. Chapter 198 of the Acts of the 38th General Assembly, being assailed herein, and the said statute being susceptible of an interpretation which would make it constitutional and of an interpretation which makes its constitutionality very doubtful, it is the duty of the court to adopt that construction which will uphold the validity of the statute, there  
14 being a strong presumption that the law making body has intended to act within and not in excess of its constitutional authority; and under such circumstances, it is the duty of the court to avoid serious constitutional doubts and to adopt that construction that will make the statute constitutional, and applying his rule, the acts complained of should be held not to be within the inhibition of the said statute.

7. That the acquisition of a reading knowledge of a foreign language by a child under the eighth grade is not in any way detrimental to the safety or welfare of the state or nation and does not in any way endanger the morals or happiness of the child or of the people and the power to inhibit the teaching of a foreign language in the parochial school under the circumstances disclosed in this case is not within the police power of the state, and any statute making it a crime for the defendant to teach reading in a foreign language, under the circumstances disclosed in this case in the parochial school, such as the defendant was teaching, would be void under both the state and Federal constitution. Therefore, it is the duty of the court, either to declare the statute unconstitutional, or to so construe it and limit the operation thereof to such matters as may be the proper subject of police legislation.

8. That the facts of the defendant as disclosed by the stipulation of facts herein not being within the letter and spirit of the law, proper construction of said statute requires that exceptions thereon be implied by the court as they must have been implied by the legislature, and the statute should be so construed as to uphold liberty, civil and religious, of the defendant and of the people of the state and as will protect them in their inalienable rights.

9. That if this case was tried to a jury, it would be the duty of the court, under the stipulation of facts herein, to direct a verdict for the defendant, or if the case was submitted to a jury and a verdict of guilty returned, it would be the duty of the court to set the same aside as not sustained by sufficient evidence, and it is therefore, the duty of the court to discharge the defendant and to hold that he is not guilty of committing any crime under the law of the State of Iowa.

After argument upon the above motion, the court took the same under advisement with agreement of parties that ruling might be had thereon and the case be decided later in the term.

#### *Ruling on Motion.*

On March 1, 1920, the court overruled the defendant's motion for directed verdict and to dismiss the case and each and every ground thereof, to all of which the defendant at the time excepted.

On said first day of March, 1920, the court found that under the stipulation of facts the defendant was guilty of the offense charged in the information, to which defendant duly excepted.

#### *Motion for New Trial.*

Thereupon on March 1, 1920, the defendant filed motion for new trial, as follows:

16 "Comes now the defendant and moves the court to grant a new trial to the defendant in this case on the grounds and each thereof stated in the motion to direct a verdict, which by this reference is made a part of this motion."

On March 1, 1920, the court overruled defendant's said motion for a new trial, to which the defendant at the time excepted.

#### *Judgment.*

And the defendant being present in court by his attorney, F. Hagemann, waived time, and thereupon the court pronounced judgment that the defendant was guilty of the offense charged in the information and imposed a fine upon him of \$25.00 and costs taxed at \$—, and fixing the bond on appeal at \$300, to which judgment the defendant at the time duly excepted.

*Appeal Bond.*

That on the 8th day of March, 1920, the defendant duly filed in the office of the Clerk of the District Court has appeal bond in the sum of \$300 conditioned as required by law with sureties approved by the Clerk.

*Appeal to the Supreme Court.*

On the 8th day of March, 1920, the defendant duly appealed from the judgment and ruling of the trial court to the Supreme Court of Iowa by serving a notice of appeal in the usual form upon H. M. Havner, attorney general, F. C. Davidson, assistant attorney general, and W. H. Wehrmacher, county attorney, attorneys of record for the state, and upon I. E. Smith, Clerk of the District Court of Bremer County, which notice was duly filed with the Clerk of the District Court in said cause.

*Certificate.*

We hereby certify that the foregoing is a true, full and complete abstract of the record in said case and contains all the evidence introduced or offered on the trial of said case, and all of the objections, motions and rulings made and exceptions taken.

PICKETT, SWISHER &  
FARWELL AND F. P. HAGEMAN,  
*Attorneys for Appellant.*

We certify that the actual cost of printing the foregoing abstract of the record is \$27.00.

PICKETT, SWISHER &  
FARWELL AND F. P. HAGEMAN,  
*Attorneys for Appellant.*

*Notice of Oral Argument.*

Defendant hereby gives notice that upon the submission of the foregoing case he will argue the same orally.

PICKETT, SWISHER &  
FARWELL AND F. P. HAGEMAN,  
*Attorneys for Appellant.*

19 STATE OF IOWA, ss:

*Supreme Court of Iowa.*

Be it remembered, That on the 30th day of June, 1920, the following proceedings, among others, were had in the Supreme Court of Iowa, to-wit:

THE STATE OF IOWA, Appellee,

vs.

AUGUST BARTELS, Appellant.

Appeal from Bremer District Court.

This case is submitted on Abstract and Arguments on file and oral argument of counsel for both sides.

I hereby certify that the foregoing is a full, true and complete copy of the Record entry of said Court in the above entitled case as full, true and complete as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Des Moines, this 26 day of July, A. D. 1921.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT,  
Clerk.

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Filed February 12, 1921.

In the Supreme Court of Iowa, January Term, 1921.

THE STATE OF IOWA, Appellee,

vs.

AUGUST BARTELS, Appellant.

Appeal from Bremer District Court.

Hon. M. F. Edwards, Judge.

The defendant was convicted of a violation of chapter 198 of the Acts of the Thirty-Eighth General Assembly, which prohibits the use of any language other than English in teaching secular subjects in the public or private schools of this state. From such conviction and sentence thereon this appeal is prosecuted. The opinion states the facts. Affirmed.

Pickett, Swisher & Farwell, of Waterloo, and F. P. Hageman of Waverly, for appellant.

H. M. Havner, Atty. Gen., F. C. Davidson, Asst. Atty. Gen., and W. H. Wehrmacher, Co. Atty., of Waverly, for the State.

FAVILLE (J.):

An information filed with a justice of the peace charged that the defendant, on or about November 10, 1919—

"did use a language other than English, to-wit, the German language, as a medium of instruction in the teaching of a secular subject,

wit, reading, to Selma Steege, Cordelia Griese, and Lawrence Phipo, the said persons then and there being scholars in a private school in the aforesaid township, county, and state and receiving said instruction below the eighth grade in said school from said defendant, who was then and there a teacher in said school."

21 He was found guilty, and on appeal to the district court the case was submitted on stipulation of facts from which it appeared that:

(1) "A rural church known as 'St. John's Evangelical Lutheran Church,' located in Maxfield township, Bremer county, owns and uses a church edifice and parochial school building, and other property in connection therewith, of the value of approximately \$40,000, and during the period in question had a congregation of about 300, of whom 200 were communicants; that it is a religious organization affiliated with the Evangelical Lutheran Synod of Iowa and other states, and that the said church and its parochial school have been continuously supported and maintained by the members for religious purposes in accordance with the beliefs and practices of the said Evangelical Lutheran Synod of Iowa and other states. That among the beliefs and practices of the said church and the synod with which it is affiliated is the belief and practice of having the children of the members and communicants attend its parochial school until after their confirmation and acceptance into the church as communicants thereof, and that the object and purpose of the parochial school is to give the said children of the members and communicants a Christian education in the catechism, beliefs, and practices of the said church at the same time that they are receiving their secular education in the common branches, and to conduct daily in said school devotional exercises in accordance with said beliefs and practices."

(2) "Those attending said school are children of the members of the church, approximately 36 pupils in number, of the ages between 6 and 13 years, both inclusive. That the said school is in session 36 weeks of 5 days each, with school hours from 9 o'clock a. m. to 12 o'clock noon, and from 1 o'clock p. m. to 4 o'clock p. m. each school day, beginning about the middle of September and ending about the middle of the following June, with the ordinary holiday vacations. That ordinarily the children of the school are confirmed and received into the church on attaining the age of 13 years, at which time the said pupils are expected to, and as a rule, have completed the seventh grade in the common school branches, and usually thereafter attend the public schools in the community, entering the eighth grade thereof. The school year of the parochial school is a month or more longer than that of the public schools in the same community. The branches taught are the common school branches of reading, writing, spelling, arithmetic, geography, American citizenship, physiology, and United States history, and these are taught in the English language, with English as the medium of the instruction, the textbooks being the

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same as those used in the public schools in the same community and the instruction being substantially the same as the instruction given in the common branches of the public schools in the community.

(3) The defendant, Bartels, is "the duly appointed, employed and acting teacher of said parochial school continuously during the last 5 years. That said defendant is a competent teacher, possessing the necessary qualifications and moral character for the purpose."

(4) The members of the said church whose children attend the school are of foreign extraction, but they, as well as their children and this defendant, are citizens of this country.

(5) "The members and communicants of said church have always been accustomed to worship in the church and have devotional exercises in the home in the German language, and that the devotional exercises and religious instruction of the children in said parochial school for many years was exclusively in German. During recent years religious instruction in the said parochial school has been and is now, given in both the English and German languages. This instruction has been given in this way in order that the children might be able to participate intelligently with their parents in religious worship in the home and in the church. It is done for the purpose of enabling the parents to supplement the religious instruction of the school by instruction in religion and morals in the home. It is the desire of the parents of the children who are in attendance at said school that their children be given instruction in religious matters in the German language to enable them to read intelligently the church catechism and the Bible in the German —"

(6) Part of the communicants and members "have insufficient knowledge of the English language to freely and clearly receive and impart instruction in the matter of religion and morals, or to take part with the same freedom and the same understanding in religious or devotional exercises conducted in the English language that they would in the German; that among the duties enjoined by said church, and which are the beliefs and practices of the communicants of said church whose children are not attending the aforesaid parochial school, are the duties of assembling with the members of their families and attending at stated periods devotional services conducted in the home, and of attending with their children religious services conducted in said church, consisting of sermons, instructions in matters of faith and religion, and singing of hymns and other religious and devotional exercises usual in Protestant Christian churches. That knowledge of the catechism is essential to confirmation in the church, and that is the belief of the members and communicants of said church whose children are not attending the aforesaid parochial school. That the training of the children in religion and Christian citizenship will be materially and irreparably interfered with unless the said children learn to read the language used by the parents in worship in the church and

the home. That it is the belief of the said church and the members and communicants thereof that children should be prepared for confirmation at about the time they complete the seventh grade in the secular branches, or when they have attained the age of 13 years. It is also the belief of the members and communicants of said church that parents will not be able to perform their full Christian duty toward their children in accordance with the beliefs and practices of the church if they are unable to supplement the religious training of their children through admonitions and worship at the home conducted by the parents in the German language in which they are accustomed to worship."

(7) The defendant through the medium of the English language taught the common school branches heretofore mentioned, and also taught reading in the German language to the pupils named in the indictment, and others, who were of ages "between 6 and 13 years inclusive, and were below the eighth grade." "The text-books used in teaching reading in the German language to said pupils were printed in the German language, and contained such reading lessons as ordinarily appear in elementary reading text-books printed in the English language, and used in the public schools of the state, and are hereby admitted to be of a secular character rather than of a religious character."

24 German was used as the medium of instruction by defendant in teaching reading in the German language. This German reading was taught at the request and with the full consent of the parents of the said children, and for the purposes of teaching said children to read the German language sufficiently to enable them intelligently to read the catechism and Bible in that language and to understand and to take part in religious services conducted in said language in the church and Sunday School and in the home. The facts so stipulated were held to establish defendant's guilt, and he was sentenced to pay a fine of \$25. He appeals.

(1) From the foregoing it will be observed that the accused taught in a parochial school connected with St. John's Evangelical Lutheran Church in Bremer county, and had so done from the middle of September to November 10, 1919. The instruction was in branches below the eighth grade. He employed English as a medium of instruction in all the common school branches, but taught the pupils to read in the German language, and used German in so doing. The text-book used was printed in the German language and contained reading lessons such as ordinarily appear in the English reading text-books in the public schools, and was admitted to be of a secular character rather than a religious character. Such are the facts, and it is plain enough therefrom that the accused (1) employed the German language as a medium of instruction in a secular subject—i. e., reading—and (2) taught the German language to pupils below the eighth grade, in violation of section 1 of chapter 198 of the Acts of the Thirty-Eighth General Assembly, which provides:

"The medium of instruction in all secular subjects taught in all of the schools, public and private, within the state of Iowa, shall be the English language and the use of any language other than English in secular subjects in said schools is hereby prohibited, provided, however, that nothing herein shall prohibit the teaching and studying of foreign languages as such as a part of the regular school course \* \* \* above the eighth grade."

The second section of the act provides for a penalty against any person violating any of the provisions thereof. It cannot well be contended but that the accused, in what he did, brought himself clearly within the letter of the prohibition of this act, and we do not understand his counsel to contend otherwise. Appellant's theory seems to be that the acts complained of were not intended by the law makers to be prohibited, and, if so intended, the statute is inimical to certain provisions of the Constitution. This contention is based largely on the fact that the school in question is maintained by the members of the church, and it is contended, in accordance with the object of giving their children an education in the catechism, beliefs and practices of the church at the same time they are receiving their education in the branches, that it is desirable that they be taught to read in German. Ordinarily their religious education is so advanced when they attain the thirteenth year that they are taken into the

church, and as ordinarily they have then completed the  
 26      enth grade in the common branches they enter the eighth  
         grade of the public school in the same community. The  
 members of the church are of foreign extraction, but are, as well as  
 their children, citizens of this country. They are accustomed to wor-  
 ship at church, as well as at home, in the German language. For-  
 merly the religious instruction was given in the parochial school ex-  
 clusively in German, but in recent years in English as well. The  
 purpose of instruction in German was to enable the parents to sup-  
 plement the religious instruction of the school by instruction in re-  
 ligion and morals in the home. These parents desire their children  
 to acquire sufficient knowledge of the German language to enable  
 them to read intelligently the church catechism and Bible in Ger-  
 man. A considerable number of the members of the church cannot  
 speak or read in English, and these participate in worship with  
 their children and impart instruction in German. It is the belief  
 of members and communicants of the church that parents will not  
 be able to perform all their full Christian duty toward their children  
 in accordance with the beliefs and practices of the church if they  
 are unable to support the religious training of their children through  
 admonition and worship at the home conducted by the parents in the  
 German language, in which they are accustomed to worship. It is  
 to be observed that neither the statute quoted nor any other of the  
 state restricts the right of parents at home or through instructors in  
 private or parochial schools to worship according to their  
 27      faith and religious belief in whatever language they choose  
         unless it may be said that such be the effect of this statute  
 limiting the use of languages other than English in imparting in

struction, and prohibiting the teaching thereof below the eighth grade. It is not pretended that religious instruction at home, in the church, or school has been interfered with, save as the right to teach the German language, especially in reading, is impinged upon by denial of the right to instruct pupils therein and thereby qualify the children to participate in worship with their parents and receive instruction from them.

(2, 3) It is helpful in construing or interpreting statutes to ascertain the general policy of the state regarding the subject. Surely no one will gainsay that the state has a right, under its general police power, to enact reasonable and proper statutes respecting the education of its youth. Such power and right has been too long recognized to now be questioned or to require citation of authority to support its legitimate exercise.

(4, 5) It is undoubtedly true that the state cannot pass arbitrary laws excluding foreigners from its borders. The power to regulate and restrict immigration rests in the federal government alone. But the state does have the power to control its own internal affairs and to prescribe such laws as are proper for the government of its citizenry, provided such laws do not contravene the provisions of the Constitution of the United States or of the state.

28 It is true that the federal government has the exclusive control of the gates of Castle Garden, and can determine who may enter through them, but when a foreigner has passed through those portals and has become a resident of the state of Iowa, he becomes at once amenable to the laws of this state in so far as they do not transcend those constitutional rights vouchsafed to all citizens. The state has a right to adopt a general policy of its own respecting the health, social welfare, and education of its citizens, and as long as it does no violation to constitutional inhibitions the citizen within its borders has no other alternative than to obey or remove to a more congenial environment. Iowa has not been backward in enacting legislation under these well-recognized powers. Our public health statutes, providing for compulsory quarantine and similar regulations, have been upheld and enforced. A citizen may feel that he has a perfect right to determine for himself whether his child under 16 years of age shall be employed, and the hours and conditions of such service, but, if so, he must acquire residence in some state which has no child labor law similar to ours. So, too, with many other statutes which have been enacted by our General Assembly and are the settled policy of this state. To all such the person, native-born or foreigner, who seeks residence within this commonwealth must subscribe. From the earliest days the settled policy of this state has been to foster, encourage, and promote the education of its youth. Our great public school system and our state institutions of higher education are the outcome and result of this policy. No one will dispute the power and the right of the state to adopt and carry out such a beneficent policy. Our question in the in-

stant case concerns the limitations that shall be placed upon the exercise of the power of the state in the fulfillment of that policy. We have a right to consider the policy of the state, the condition sought to be remedied, and the remedy proposed.

For many years we have had a statute in this state known as the "Compulsory Education Law." It provides that—

"Any person having control of any child of the age of seven to sixteen years inclusive, in proper physical and mental condition to attend school, shall cause said child to attend some public, private, or parochial school, where the common school branches of reading, writing, spelling, arithmetic, grammar, geography, physiology, and United States history are taught, or to attend upon equivalent instruction by a competent teacher elsewhere than school, for at least twenty-four consecutive school weeks in each school year, commencing with the first week of school after the first day of September, unless the board of school directors shall determine upon a later date, which date shall not be later than the first Monday in December, but the board of school directors in any city of the first or second class may require attendance for the entire time the schools are in session in any school year." Code Supp. 1913, Sec. 2823a.

Can any one doubt the established and settled policy of the state to compel the education of all children within its borders between the ages of 7 and 16 years? But some citizen may say that he does not care to have his child educated in the prescribed branches or to attend school at all. The power of the state to enforce such a statute against the wish of the citizen has been challenged, but, so far as we are advised, without success.

So we have the fixed policy of the state that all children between the ages of 7 and 16 must attend either a public or private school for a specified time and study specified branches. As early as the Code of 1897, Sec. 2749, it was provided that in the public schools the electors might determine that additional branches should be taught, but that "instruction in all branches except foreign languages shall be in English." Here again was a declaration of the policy of the state that has long stood unchallenged.

Again, the Thirty-Eighth General Assembly passed an act providing that—

"All public and private schools located within the state of Iowa shall be required to teach the subject of American citizenship." Chapter 406, Acts 38th G. A.

Here we have a clear pronouncement of the policy of the state in regard to all schools, either public or private. Did the Legislature have power to enact such a statute?

Can the state not only compel children to attend school, either public or private, but also designate the branches that must be taught, and that these shall include the subject of American citizenship?

Can some teacher of a private school claim immunity from prosecution for violation of this statute because of the claim that his constitutional rights are invaded, and that the state has no power to compel him to teach American citizenship in a private school? We are referring to these statutes merely to show the established and settled policy of the state.

With this situation before it, the Thirty-Eighth General Assembly enacted the statute in question, providing that in private as well as public schools all secular subjects shall be taught in English below the eighth grade. Was this consistent with the established policy of the state? It applied the established policy of the use of English to private as well as public schools below the eighth grade, and in effect prohibited the teaching of any secular subject in any other language to pupils of the designated class. It is apparent at once that this legislation is consistent with the long-existent policy of this state in providing for the education of its youth, in making that education compulsory, in providing what branches of learning must be taught, and finally in requiring that, for pupils below the eighth grade, all such instruction in both public and private schools shall be in the English language. The policy of the state has been a progressive one, but it has been consistent and in full keeping with its powers to do all these things for the better training and education of its youth for the full duties and responsibilities of American citizenship. The advent of the great World War revealed a situation which must have appealed very strongly to the Legislature as justifying the enactment of this statute. Men called to the colors were found to be in some instances not sufficiently familiar with the English language to understand military commands or to read military orders. It was to meet this situation, to encourage the more complete assimilation of all foreigners into our American life, to expedite the full Americanization of all our citizens that the Legislature deemed this statute for the best interests of the state.

The manifest design of this language statute is to supplement the compulsory education law by requiring that the branches enumerated to be taught shall be taught in the English language and in no other. The evident purpose is that no other language shall be taught in any school, public or private, during the tender years of youth, that is, below the eighth grade, to the end (1) that pupils in our schools, public or private, shall be educated in the language of this country, so as to be able to read, write, and spell the same; (2) that time ordinarily devoted to such object be not diverted to others; (3) that pupils be impressed in their youth that English is the language of this country, without a rival, even though another be spoken at home; and (4) that an education such as is given in the common schools be extended to pupils in the private schools, and that the standard of education shall be uniform throughout the state. The policy of the state is apparent, and the evil sought to be remedied is manifest. With the wisdom of the act of the Legislature in passing the statute in question as a means of meeting this situation and seeking to remedy the same we have no con-



cern whatever. That question was wholly for the determination of the General Assembly. They adopted such means as to them seemed wise, appropriate, and efficient.

(6, 7) Our sole inquiry is, Did the Legislature in enacting this statute contravene constitutional provisions? From an early day it has been the rule of this court that a law will be declared to be unconstitutional only when it is "clearly, plainly and palpably so." The case must be "clear, decisive and unavoidable." The court "performs the duty with scrupulous regard for the prerogatives of the co-ordinate branches of the government and without loss of power." See *Morrison v. Springer*, 15 Iowa, 304; *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487; *Stewart v. Board of Supervisors*, 30 Iowa, 14, L. Am. Rep. 238; *McGuire v. C., B. & Q. R. R.*, 131 Iowa, 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706; *Hubbell v. Higgins*, 148 Iowa, 36, 126 N. W. 914, Ann. Cas. 1912B, 822; *State v. Fairmont Creamery Co.*, 153 Iowa, 702, 133 N. W. 895, 42 L. R. A. (N. S.) 821; *Hunter v. Coal Co.*, 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917D, 15 Ann. Cas. 1917E, 803.

(8, 9) With these well-established rules in mind, let us inquire. Does the statute in question so infringe upon the Constitution that we must declare it to be invalid? It is the contention of the appellant that it is inimical of article 1 of the Constitution of Iowa. This provides:

"Rights of Persons.—Section 1. All men, are by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness."

"Religion.—Sec. 3. The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates, for building or repairing places of worship, or the maintenance of any minister or ministry."

Appellant's argument is to the effect that the parents of the children attending defendant's school desire that their children shall be taught to read the German language at school in order that they may read the catechism and Bible in German at home and receive instruction in religious subjects at home in the language spoken by the parents. The point is stressed that the particular thing taught was reading; that to learn to read the German language is "cultural"; that to teach reading in German is an "innocent act", and that it is being done by appellant for a religious purpose, namely, that the children may by reason thereof receive religious instruction at home in the German language. We cannot accept appellant's conclusions in this matter. It is admitted in the stipulation that the text-book used was of a secular character rather than of a religious character.

The ultimate purpose sought to be attained by defendant is not a controlling factor in determining the validity of this statute. At



the outset, let it be noticed that the statute in no manner whatsoever interferes with the defendant's right to impart religious instruction in any language he may choose in a parochial school. It is expressly limited to the teaching of secular subjects. He can teach his pupils to read the catechism in German in his school, if he desires, as religious instruction, without violating the law, but he cannot teach the secular subjects, of reading writing spelling, grammar, etc., in any foreign tongue. In this there is no interference whatever with appellant's "free exercise" of religion. He cannot teach writing in German and evade the effect of the statute by claiming that he did so because his pupils must learn to write on religious themes in a language their parents could read. He admits he is teaching a secular subject in direct violation of the statute.

The statute in no manner whatsoever interferes with religious freedom. It is expressly limited to secular subjects. There  
 35 is scarcely any secular subject taught in our schools that cannot fairly be said to be used in some way in connection with religious instruction or religious belief. It would be going to extreme lengths to say that the regulation of the teaching of such a subject was an interference with religious freedom, because it might be utilized in acquiring religious instruction in some way. Arithmetic, history, writing, geography, all are properly used in religious instruction to some degree. As bearing on this feature of the discussion, see *Owens v. State*, 6 Okl. Cr. 110, 116 Pac. 345, 36 L. R. A. (N. S.) 633, Ann. Cas. 1913B, 1218; *Smith v. People*, 51 Colo. 270, 117 Pac. 612, 36 L. R. A. (N. S.) 158; *Reynolds v. U. S.*, 98 U. S. 145, 25 L. Ed. 244.

(10) Again it is argued that the act in question is unconstitutional because it violates the Fourteenth Amendment to the federal Constitution. This amendment has been the subject of such discussion by our courts, federal and state, that the decisions are like the sands of the sea for number. Is any right vouchsafed to the appellant by this amendment violated by this statute? There is, as we view it, no inherent right, no "privilege" to teach German to children of tender years that cannot lawfully be denied by the Legislature when, in its judgment and discretion, the exercise of such right under existing conditions is inimical to the best interests of the state.

(11) This constitutional protection is enjoyed always subject to the police power of the state to regulate professions, trades, and occupations in the interest of the public welfare. The statutes  
 36 regulating the practice of medicine, dentistry and law are familiar examples of such lawful exercise of the power of the state regarding professions. See *Reetz v. Michigan*, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563; *State v. Bair*, 112 Iowa, 466; *Gundling v. Chicago*, 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725; *Hunter v. Coal Co.*, supra; 12 Corpus Juris, 1121.

(12) As we have observed, a known evil existed; it was within the power of the Legislature to seek to remedy it by the enactment

of this statute. The defendant has a right to engage in the profession of teaching, but in so doing he is subject to such legislative enactments as may be fairly and reasonably said to be for the public welfare. We think this statute was a proper and reasonable exercise of the police power of the state in attempting to prevent an existing evil which the Legislature regarded as inimical to the public welfare. Such being the case, the defendant has not been denied any privileges guaranteed him by the Constitution.

(13) Again it is argued that the act in question is class legislation. We do not so regard it. It operates upon all amenable to it alike. All persons similarly situated are affected alike by it. It applies equally to every teacher of the state, in public, parochial, and private schools, teaching pupils below the eighth grade.

(14) We have recognized the well-established rule that—

Classification "must be natural and reasonable and not arbitrary or caparicious. The legislation must extend to and embrace accurately all persons who are or may be in like circumstances." *State v. Fairmont Creamery Co.*, *supra*.

37 (15) For the purpose of ascertaining whether or not the classification is arbitrary and unreasonable, we must take into consideration matters of common knowledge and common report and the history of the times. *Chicago, B. & Q. R. Co. v. McGuire*, 21 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328; *State v. Fairmont Creamery Co.*, *supra*.

We have already referred to the conditions that existed and the evil the Legislature sought to remedy. As before stated, the act applies uniformly to all teachers of the state below the eighth grade. We do not think such classification either arbitrary or unreasonable.

(16) It is argued by appellant that the statute is unreasonable in prohibiting the teaching of a foreign language below the eighth grade, while permitting it to be taught to those more advanced. We must again look to the purpose of this enactment. The Legislature might well have felt that it was of vast importance that those of tender years should have at that early period instilled in their minds the lessons to be taught only through the use of the English language; that, if foreign languages are to be taught for "cultural effect," it shall be only after the child has been "rooted and grounded" in the recognized language of our country. The harmful effects of non-American ideas inculcated through the teaching of foreign languages might, in the judgment of the Legislature, be avoided by limiting teaching below the eighth grade to the medium of English. We do not regard the statute as making an arbitrary or unreasonable classification, or as in any manner violating these constitutional provisions.

38 Statutes of like effect have been enacted in Nebraska, Kansas, Maine, Washington, Arkansas, Indiana, New Hampshire, Wisconsin, and perhaps other states. So far as we are advised, none of such statutes have been held to be unconstitutional. In Nebraska

District of Evangelical Lutheran Synod v. McKelvie, 175 N. W. 531, A. L. R. 1688, the Supreme Court of Nebraska sustained the constitutionality of the statute of that state, which is almost identical with the statute under consideration.

We hold this statute to be constitutional and a proper exercise of the police power of the state.

It follows that the conviction of the defendant upon the stipulated facts was warranted, and the judgment of the lower court is therefore affirmed.

Stevens, Arthur, and De Graff, JJ., concur.

Evans, C. J., and Weaver and Preston, JJ., dissent.

EVANS, C. J.:

I am constrained to disagree with the majority opinion. The construction of our statute adopted therein is a very severe one. Under elementary rules a criminal statute which creates an offense that is *malum prohibitum* should be construed strictly in the sense that nothing shall be added to it by mere implication. The statutory prohibition under consideration here is contained in section 1, c. 198, 28th G. A., and is as follows:

"Section 1. Secular Subjects—Instruction in—English Language Medium of—Foreign Languages—Where Permitted. That the medium of instruction in all secular subjects taught in all of the schools, public and private, within the state of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited."

The precise question presented in this case is whether the teaching of reading a foreign language in a private religious school, for the purpose of enabling a child to worship in a common language with its parents and to take religious instruction therein, such as the reading of the catechism, etc., is a violation of this statute. As stated in the majority opinion, the evidence in this case was all contained in a written stipulation. It appears therefrom that the defendant was a teacher in a parochial school belonging to a church or religious denomination, and that it was his duty as such to give instruction in secular subjects, and also in the tenets of the church, so as to prepare the children for confirmation in the church according to its belief and practice, which confirmation was usually attained at about the age of 13. All secular subjects taught in such school were so taught in the medium of the English language as required by the statute. Religious instruction was given in a foreign language, namely, the language of the parents of the children. The prosecution is based upon the general proposition that the teaching of "reading" of any language is the teaching of a secular subject. This is the implication which broadens this statute beyond the terms of any prohibition contained therein. I cannot assent to it. "Reading" as a study is simply a means of acquiring a language. It is language study. Reading as an acquisition, as a thing learned, is a means of study of all subjects of every nature, whether they be

called secular or religious. The majority opinion properly conceives that this prohibition does not restrict the right of parents at home or through instructors in a private or parochial school to worship according to their faith and religious belief in whatever language they choose. This concession is clearly necessary to save the constitutionality of the statute. Section 3, article 1, of the Constitution of Iowa provides:

"The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Obedient thereto, the peace officer has never invaded the sanctuary of any religious denomination in Iowa. It goes without saying that the free exercise of religion is impossible without the free use thereof of such language as the worshiper may choose. Ordinarily the language is his native language, or at least the language with which he is best familiar. There is no pretense in this statute at interference with that right. Ability to speak and to read a language is essential to intelligent worship. Concededly the parents had a right to worship in their own language. Necessarily the children had a constitutional right to worship in the same language. Is the study of the language of worship to be deemed necessarily a secular subject? Is "reading" as a study or "reading" as an acquisition when it is resorted to for the purposes of intelligent worship to be deemed necessarily a secular subject, or may it also be deemed as a religious subject? By the terms of the written stipulation herein the study or teaching of reading of the foreign language was only for the purpose of worship and religious instruction. We must not depart from the stipulation of facts. The one provision of the stipulation upon which the prosecution builds its argument is that the text-books used in the study of "reading" were the ordinary text-books used in all schools for that purpose, and that the subjects of the reading lessons were secular subjects. It is argued therefore that this fact made the study a secular subject. This implies that the student of the language is to be deemed as studying the variety of subjects which appear in the reading lessons of the text-book. The implication thus indulged in is one which arises entirely outside of the statute under consideration. In my judgment it is not a sound implication as a matter of fact. Lessons for the teaching of "reading" must have subjects in order to mean anything. These lessons are not selected for the subjects they contain, but for the adaptability of the words and sentences contained therein to the stage of progress of the learner in the study of the language. I think, therefore, that the subjects of the lessons of the text-book used in the study of "reading" does not fix the character or the purpose of the study. I think it clear also that "reading" as a study and as a necessary part of religious instruction is not to be deemed as a secular subject within the meaning of the prohibition of this statute.

We are committed to the proposition that the motive or purpose of a given conduct is to be considered in determining whether it be secular or religious. *State v. Amana Society*, 132 Iowa, 304. 109 N. W. 894, 8 L. R. A. (N. S.) 909, 11 Ann. Cas. 231. The defendant is

the cited case was an incorporated body. Its membership consisted of a religious community. Their religious beliefs were carried into their practical everyday life. They held all property in common; all members engaged in service; they owned lands and factories and merchandise and live stock into values of hundreds of thousands of dollars. The question involved in the suit against them was whether they were engaged in secular pursuits. We held that they were not, and that all their activities of everyday life, such as would ordinarily be deemed and be in fact secular, were nevertheless the exercise of their religious beliefs, and that these activities were their response to their sense of religious daily duty. In another division hereof I shall incorporate excerpts from the opinion in this case, as well as from other opinions.

Having held in the cited case that the operation by the Amana Society of its factories, mills, stores, farms, all apparently done by the ordinary methods of business, was not a secular business because its dominant motive was religious, how shall we now say that the study of "reading" for the stipulated purpose of religious instruction and worship is secular and not religious? To so hold is, in my judgment, to trench upon the constitutional provision which I have above quoted. The courts of this country in all jurisdictions have quite uniformly construed all penal statutes so as to exclude their operation from the religious domain, and so as to protect the absolute freedom guaranteed by the Constitution of religious belief and exercise. If there is any exception to this rule it has arisen only in relation to extraordinary practices which disturb the public order or shock the sense of fundamental Christian morality; such, for instance, as polygamy. In the case of *Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, an analogous question was before the Supreme Court of the United States, wherein that court construed a federal statute, which prohibited any person from paying the transportation or in any way assisting the importation or migration of any alien into the United States under contract or agreement, express or implied, to perform labor or service of any kind in the United States. *Trinity Church* had entered into contract with a rector in England that he should come to New York and serve its parish there. Such action on the part of *Trinity Church* was within the literal terms of the prohibiting act. The Supreme Court, however, construed the act as not applying to the case, notwithstanding its all-inclusive terms, because to so construe it would be an interference with the religious freedom guaranteed by the Constitution, and because such an act was inherently innocent, and was therefore beyond the reach of a penal statute. For convenience of reference excerpts from this opinion will be set out later.

An act similar to ours was enacted in Nebraska, and was construed by the Supreme Court of that state. It was construed as not prohibiting the teaching or studying of foreign languages for religious purposes, even though its language was broad enough to include such prohibition. Nebraska District of Evangelical Luth-

eran Synod, etc., v. McKelvie, 175 N. W. 531, 7 A. L. R. 168. The argument of the court in that case was that the affirmative purpose of the legislation was to require the teaching of the English language and to make it the medium of secular instruction, and that as long as such dominant purpose was carried out in the particular school the additional study of foreign languages for religious purposes should not be deemed prohibited. It was also held that such prohibition would be an interference with religious freedom.

44 Instead of pursuing farther mere argument of mine upon the question, I set forth in the following division excerpts from the cited cases, which to my mind constitute a quite sufficient argument. Let it be borne in mind that in the instant case the defendant met every affirmative requirement of the statute, and taught a full course of secular subjects suitable to the grades, and used the English language as the medium of all such teaching, and that it includes the subject of "reading" in English. When we reflect that the secular and the religious blend in every normal human life, that the secular serves religion, and religion, if it be true, enhances the secular, it must be true that the zone of division is a broad and indefinite one, and that a sharp and definite line of demarcation cannot be drawn. I only contend that the study of language, including its "reading," may be religious, even though it be true that it may also be secular. If such study may be religious, then under the stipulation of facts in this case it was pursued for religious purposes. Even in the absence of such definite stipulation, I would think that the mere rule of strict construction of penal statutes would require us to adopt the more innocent construction.

II. In the case of *State v. Amana Society*, 132 Iowa, 304, 189 N. W. 894, 8 L. R. A. (N. S.) 909, 11 Ann. Cas. 231, the contention of the state was that this society, being organized solely as a religious society, was unlawfully and in violation of its charter rights engaged in business and manufacturing pursuits for financial gain.

45 Quoting from the opinion on page 314 of 132 Iowa, on page 898 of 109 N. W. (8 L. R. A. (N. S.) 909, 11 Ann. Cas. 231):

"Theoretically the distinction pointed out may be correct. Practically religion may not be so completely separated from the affairs of this life. Theology, the science of religion, \* \* \* has steadily insisted upon connecting religion with the life men lead and the things they do in this world. The great religious struggles of the past have come in most cases from the undertaking of men to impose on other men, not their religion, but their science of religion and against this, rather than religion, as defined by the Attorney General, the law has interposed its shield of protection. When theologians formulate their conclusion that anything so simple as a particular mode of life is essential to the attainment of the promised benefits of a religion, it is not for the courts, by resort to the definitions of lexicographers, to perform the ungracious, not herculean, task of determining whether this is so. The anticipated advantages of nearly every religion or creed are made dependent upon the observance of certain rules of life."



not on the life its followers live, and the criticisms most often heard are that the exalted doctrines of righteousness professed are too frequently forgotten in the ordinary pursuits of life, and that the contests for wealth are waged with the rapacity of beasts of prey. Surely a scheme of life designed to obviate such results, and by removing temptations and all the allurements of ambition and avarice to nurture the virtues of unselfishness, patience, love, and service, ought not to be denounced as not pertaining to religion, when its devotees regard it as an essential tenet of their religious faith.

"In ascertaining whether various properties of the society are for religious purposes, these should be viewed somewhat from the standpoint of its members. From that viewpoint its different enterprises are clearly within the rule stated by the Attorney General that this must 'be convenient and appropriate to religious work and ceremonies and to the worship of God according to their belief'; for it is indispensable to their religious faith that they own their property in common and live a communal life. As a religious principle they have agreed to this and to devote their common labor to their common support. None can be said to derive any pecuniary benefit therefrom in the sense in which that expression is used in the statute. No dividends are declared, and no money is given to any member, save to meet the bare necessities of the most economical existence. \* \* \*

"On these considerations we reach the conclusion that the defendant society has not exceeded its powers as a religious corporation. Secular pursuits, such as those conducted by it, are not ordinarily to be regarded as incidental to the powers of a religious corporation for the very good reason that ordinarily they bear no necessary relation to the creed it is organized to promote. But, where the ownership of property and the management of business enterprises in connection therewith are in pursuance of and in conformity with an essential article of religious faith, these cannot be held, in the absence of any evidence of injurious results, to be in excess of the powers conferred by the law upon corporations. We have discovered no decision touching the question decided; but, in view of the spirit of tolerance and liberality which has pervaded our institutions from the earliest times, we have not hesitated in giving the statute an interpretation such as is warranted by its language and which shall avoid the persecution of any and protect all in the free exercise of religious faith, regardless of what that faith may be. Under the blessings of free government, every citizen should be permitted to pursue that mode of life which is dictated by his own conscience, and if this, also, be exacted by an essential dogma or doctrine of his religion, a corporation organized to enable him to meet the requirement of his faith is a religious corporation, and as such may own property and carry on enterprises appropriate to the object of its creation."

In the Trinity Church Case the Supreme Court of the United States said (143 U. S. 467, 12 Sup. Ct. 512, 36 L. Ed. 228):



"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter. \* \* \*" 143 U. S. 465, 12 Sup. Ct. 514, 36 L. Ed. p. 230. "But beyond all of these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. \* \* \* 'Religion, morality, and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools and the means of education shall forever be encouraged in this state.' \* \* \* There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in *Updegraph v. Com.*, 11 Serg. & R. 394, 400 it was decided that 'Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; \* \* \* not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men.' \* \* \* The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the Legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the Legislature, and therefore cannot be within the statute."

In the cited case of *Nebraska District of Evangelical Lutheran Synod, etc., v. McKelvie*, 175 N. W. 531, 7 A. L. R. 1688, the Supreme Court of Nebraska said:

"The operation of the Selective Draft Law (Act May 18, 1917, 15, 40 Stat. 76, U. S. Comp. St. 1918, Sections 2004a-2004k) disclosed a condition in the body politic which theretofore had been appreciated to some extent, but the evil consequences of which had not been fully comprehended. It is a matter of general public information, of which the court is entitled to take judicial knowledge, that it was disclosed that thousands of men, born in this country of foreign language speaking parents, and educated in schools taught a foreign language, were unable to read, write, or speak the language of their country, or understand words of command given in English. It was also demonstrated that there were local foci of alien enmity."

entiment, and that, where such instances occurred, the education given by private or parochial schools in that community was usually found to be that which had been given mainly in a foreign language. The purpose of the new legislation was to remedy this very apparent need, and by amendment to the school laws make it compulsory that every child in the state should receive its fundamental and primary education in the English language. \* \* \* That the same character of education should be had by all children, whether of foreign-born parents, or of native citizens. The ultimate object and end of the state in thus assuming control of the education of its pupils is the upbuilding of an intelligent American citizenship, familiar with the principles and ideals upon which this government was founded, to imbue the alien child with the tradition of our past, to give him the knowledge of the lives of Washington, Franklin, Adams, Lincoln, and other men who lived in accordance with such ideals, and to teach him love for his country, and hatred of dictatorship, whether by autocrats, by the proletariat, or by any man, or class of men. \* \* \* The state should control the education of its citizens far enough to see that it is given in the language of their country, and to insure that they understand the nature of the government under which they live, and are competent to take part in it. Further than this, education should be left to the fullest freedom of the individual. \* \* \* If a child has attended either the public or private school for the required time, it could not have been the intention of the Legislature to bar its parents, either in person or through the medium of tutors or teachers employed, from teaching other studies as their wisdom might dictate. There can be no question of the cultural effect of the knowledge of a foreign language. \* \* \* If the law means that parents can teach a foreign language, or private tutors employed by men of means may do so, but that poorer men may not employ teachers to give such instruction in a class or school, it would be an invasion of personal liberty, discriminative, and void, there being no reasonable basis of classification; but if such instruction can be given in addition to the regular course, and not so as to interfere with it, then equality and uniformity results, and no one can complain."

III. I do not discuss the question of constitutionality, because the majority opinion in effect concedes that if the statute is an interference with religious liberty, it would be unconstitutional. There is no room for difference therefore between us at that point. I think that represents the point of difference between us, far as the question of interference with religious liberty. The majority hold otherwise, and that represents the point of difference between us, so far as the question of constitutionality is concerned, I would reverse.

49 Weaver and Preston, JJ., join in this dissent.

50 Be It Remembered, That on the 12th day of February, 1921, the following proceedings were had in the Supreme Court of Iowa, to-wit:

STATE OF IOWA, Appellee,

vs.

AUGUST BARTELS, Appellant.

Appeal from Bremer District Court.

In this cause, the Court being fully advised in the premises, file their written opinion affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby affirmed, and that Writ of Procedendo issue accordingly.

It is further considered by the Court that the appellant pay the costs of this appeal taxed at \$—, and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the judgment entry of said Court in the above entitled cause as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 26th day of July, A. D. 1921.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT.

Clerk of Supreme Court.

51 Filed Mar. 7th, 1921. B. W. Garrett, Clerk of Supreme Court.

In the Supreme Court of Iowa.

No. 33509.

STATE OF IOWA, Appellee,

vs.

AUGUST BARTELS, Appellant.

*Notice of Intention to Petition for Rehearing.*

To the State of Iowa, Appellee, and  
To Ben I. Gibson, Attorney General:

You are hereby notified that the appellant, August Bartels, intends to petition the Supreme Court of Iowa for a rehearing in the above entitled cause, opinion in which was filed by the Supreme Court on February 12, 1921, and that his petition for rehearing will be filed with the Clerk of said court within the time provided therefor by the statute.

PICKETT, SWISHER &  
FARWELL AND

F. P. HAGEMANN,

Attorneys for Appellant.

Due and legal service of the foregoing notice of intention to petition for rehearing is accepted at Des Moines, Iowa, on this 4th day of March, 1921, and receipt of copy thereof acknowledged.

BEN J. GIBSON,

*Atty. Genl.;*

B. J. FLICK,

*Asst. Atty. Genl.,*

Attorney General of the State of Iowa,

*For Appellee.*

Due and legal service of the foregoing notice of intention to petition for rehearing is accepted at Des Moines, Iowa, and receipt of copy thereof acknowledged this 7th day of March, 1921.

B. W. GARRETT,

*Clerk of the Supreme Court of Iowa.*

52 Filed April 6th, 1921. B. W. Garrett, Clerk of Supreme Court.

In the Supreme Court of Iowa, May Term, 1921.

STATE OF IOWA, Appellee,

vs.

AUGUST BARTELS, Appellant,

Criminal.

Appeal from Bremer County District Court.

Hon. M. F. Edwards, Judge.

Ben I. Gibson, Attorney General,

Attorney for the State.

Pickett, Swisher & Farwell, and

F. P. Hagemann,

Attorneys for Appellant.

*Petition for Rehearing.*

I, the undersigned attorney for the state, Appellee, hereby accept due and legal service of the within Petition for Rehearing, and acknowledge receipt of copies thereof this 6th day of March, 1921.

BEN J. GIBSON,

*Atty. Gen'l,*

B. J. FLICK,

*Asst. Atty. Gen'l,*

*Attorney for State, Appellee.*

The opinion in this case was filed February 12, 1921, and found in 181 Northwestern, at page 508.

53     *The opinion in this case was filed February 12, 1921, and is found in 181 Northwestern, at page 508.*

### *Notice of Rehearing.*

Notice of Intention to Petition for Rehearing was duly given and served and filed with the Clerk of this court within thirty days from the time the opinion was filed, all as provided by the statute and rules of the court.

A rehearing is asked on the following grounds:

First. The provision of the language act prohibiting the teaching of a foreign language as an additional subject in the grades of a private school is unconstitutional in this:

(1) It abridges the privileges and immunities of the defendant and deprives him of liberty and property without due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution.

(2). It abridges the inalienable rights of the defendant within the meaning of Section 1 of Article I of the Constitution of Iowa.

(3) It prohibits the free exercise of religion within the meaning of Section 3 of Article I of the Constitution of Iowa.

Second. The foreign language was taught solely for a religious purpose and as a part of the religious instruction of the defendant school, and the act of the defendant in so teaching a foreign language is not within the letter of the statute and therefore prohibited.

Third. Under the circumstances shown in this case, the act of teaching a foreign language was innocent and harmless, and therefore not within the spirit of the statute, although possibly

54     within the letter, and therefore the rule implying an exception to the general language of the statute in favor of such innocent and harmless act should obtain in this case, and this is especially true in that the implication is necessary to save the constitutionality of the statute.

55

### *Brief.*

#### The Constitutional Question.

The statute is not within the police power of the legislature.

"In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or gen-

eral welfare, that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable, and appropriate manner tend toward the accomplishment of the object for which the power is exercised."

12 Corpus Juris, page 929, Sec. 441.

Buchanan v. Warley, 62 Law Ed. 149 U. S., p. 163.

Lawton v. Steele, 38 L. Ed. 385, p. 389.

Berea College v. Commonwealth of Kentucky, 53 L. Ed. 81, p. 90.

Lochner v. New York, 49 L. Ed. 937, p. 941.

Truax v. Raich, 60 L. Ed. 131, p. 135.

Yee Gee v. City, 235 Fed. 757, p. 763.

People v. Steele, 83 N. E. 236 (Ill.); 14 L. R. A. (N. S.) 361, p. 365.

People v. Weiner, 1916C L. R. A. 775, p. 778.

Therefore, in that the statute does not provide an appropriate remedy for the evil and there is no real or substantial connection between the evil and the provisions of the act, the statute is unconstitutional under the provisions of:

66 14th Amendment to the Federal Constitution Sections 1 and 3, Article I of the Iowa Constitution.

The natural rights of man are protected by the above constitutional provisions.

11 Corpus Juris, 800.

12 Corpus Juris, 934, Sec. 444.

The basis of classification in the language act is arbitrary and unreasonable, and therefore said act is void.

Nebraska District of Evangelical Lutheran Synod v. McKelvie, 175 N. W. 530, 535.

## II.

The foreign language was taught in the instant case for religious purposes and as a part of the religious instruction, which instruction was not prohibited by the letter of the act.

State v. Amana Society, 132 Iowa, 304.

Trinity Church v. United States, 36 L. Ed. 226, 228, 229.

## III.

Under the circumstances of this case, the act of teaching a foreign language was harmless and innocent, therefore such act is not within the spirit of the statute, although possibly it is within the letter.

Therefore an exception should be implied so as to avoid making such harmless act criminal.

State v. Gish, 168 Iowa, 70, 78.

State v. Botkin, 71 Iowa, 87-89.

Back v. Back, 148 Iowa, 223, 229.

57 Trinity Church v. United States, 36 L. Ed. 226, 228, 229.

De Hasque v. Railway Co., 173 Pac. 73.

Hunter v. Coal Co., 175 Iowa, 245, 268 and 269 and authorities therein cited.

Fox v. Washington, 59 L. Ed. 573, 575.

It is essential to imply such exception in order to save the constitutionality of the statute. Statutory rules of construction require such exception to be implied where even serious doubt as to constitutionality exists.

Hunter v. Coal Co., 175 Iowa, 245, 268 and 269, and authorities therein cited.

### *Argument.*

The facts are correctly stated in the opinion.

While the above is true, two all-important facts are not treated as though they had any materiality in the case. That reading was taught in English with English as the exclusive medium of instruction would hardly be gathered by a reading of the majority opinion. Likewise the majority apparently attaches no importance to the fact that not only were the compulsory branches including reading taught in English, but that the standard of excellence prevailing in the public schools in the same community was in no way superior to the standard maintained by the defendant in his parochial school. It manifestly is important that the children attending the defendant's school received every advantage of an English education that they could have received in the public school and that the secular education in English did not suffer by reason of the fact that they were taught religion and reading in German in the parochial school. Religion and reading in German were additional subjects and in no wise were permitted to interfere, even in the slightest, with the education of the children in the compulsory secular branches in the English language. The stipulation of fact admits every fact stated above.

### I.

#### The Constitutional Question.

With all due deference to the Justice writing the majority opinion and the Justices concurring with him, we submit that the real questions involved are scarcely touched.

The majority discusses the long established policy of the State. Likewise the majority points out what is considered the manifest



evil which was intended to be remedied by the language act, as follows:

"The advent of the great world war revealed a situation which must have appealed very strongly to the legislature as justifying the enactment of this statute. Men called to the colors were found to be in some instances, not sufficiently familiar with the English language to understand military commands or to read military orders. It was to meet this situation, to encourage the more complete assimilation of all foreigners into our American life, to expedite the full Americanization of all our citizens, that the legislature deemed this statute for the best interests of the State \* \* \*

"The policy of the State is apparent and the evil sought to be remedied is manifest."

That men called to the colors, as well as other citizens, should know English, is manifest. Likewise proper legislative action which will assist the "melting pot" to work more effectively is desirable.

However, the existence of even a "manifest evil" is not sufficient of itself to uphold the constitutionality of a legislative act. In addition to the "evil," it must appear that there is a "clear, real and substantial connection" between such "manifest evil" and the "actual provisions" of the act. Likewise, it must appear that the act of the legislature tends in "some plain, appreciable and appropriate manner toward" the remedying of the evil.

The evil may be conceded, but if the other requirements, or either thereof, are wanting, the statute falls under the ban of the constitution, state and federal.

After pointing out the four ends which the majority finds the legislature intended to accomplish by the statute, and which we hereinafter quote, the majority says:

"With the wisdom of the act of the legislature in passing the statute in question as a means of meeting this situation and seeking to remedy the same, we have no concern whatever. That question was wholly for the determination of the General Assembly."

Pursuing the same thought, the majority says:

"There is, as we view it, no inherent right, no 'privilege' to teach German to children of tender years that cannot lawfully be denied by the Legislature when, in its judgment and discretion, the exercise of such right under existing conditions is inimical to the best interests of the state."

In other words, the choice of means for remedying the evil, the majority holds, are exclusively within the "judgment and discretion" of the legislature and constitute a matter with which the courts "have no concern whatever."

Here we take sharp issue. We do not mean that the courts should usurp the province of the legislature; but the constitution is the fundamental law. Decisions of courts are to be regulated by the fundamental law, and when a constitutional question is raised, it is

necessary to determine what is the law, whether the constitution or the statute. Acts of the legislature which conflict with the constitution, are a nullity and should be declared such. The constitution expresses the highest degree of Americanism. In arguing for Americanism, courts must not lose sight of the instrument which preeminently expresses the doctrine of Americanism. The propaganda is un-American that claims that legislatures have power to enact any measure, police or otherwise, for the government of a society that in their judgment and discretion is necessary or desirable. We do not mean that courts are justified in declaring a law unconstitutional because they would not have supported the measure had they been members of the legislature. On the other hand, the duty of the court is not performed by finding that there is a manifest evil and the legislature intended to remedy the same by the act in question. Whether the legislature will attempt to remedy a manifest evil is within its discretion, but if it does attempt it, the legislation to that end must meet the constitutional test.

The rule when and how the police power may be exercised is well set forth in 12 Corpus Juris, page 929, section 441, as follows:

"In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare, that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable and appropriate manner tend toward the accomplishment of the object for which the power is exercised."

Here the court has found the "manifest evil." What the majority has failed to find is that "clear, real and substantial connection between the assumed purpose" of the language act and "the actual provisions" of the language act. Likewise the majority has failed to point out "some plain, appreciable and appropriate manner" in which the language act tends "toward the accomplishment of the object" for which the majority say the act was passed.

Authorities supporting the rule laid down in Corpus Juris are overwhelming. A few with pertinent excerpts will be found at the end of this division of the argument.

62 The "manifest evil" found by the majority does not consist in citizens or children knowing a foreign language. There is nothing in the opinion indicating that knowledge of a foreign language is of itself wrongful or harmful to the individual or to the state. The "manifest evil" found by the majority consists in citizens not knowing the English language and the fact, if it be a fact, that the melting pot needs assistance.

In what respect does inability to read or speak a foreign language assist in remedying this "manifest evil?" What is accomplished by prohibiting the study of a foreign language? The reason for the

prohibition does not appear in the majority opinion, for the very good reason, we believe, that there is nothing to say in its behalf. Manifestly, knowledge of a foreign language is in itself perfectly harmless. There is nothing inherently wrong with it. It is not poisonous per se; it is not un-American per se. If such knowledge is not cultural, it at least constitutes knowledge of an innocent subject which may, and often does, prove useful in numerous ways. Where children obtain an English education in all of the compulsory branches, including reading and American citizenship, and the instruction given is equivalent and in all respects maintains a standard equal to that of the public schools of the same community, in what possible way can knowledge of a foreign language, acquired at the same time the pupils are getting their English education in the common branches and in the same school and through the same teacher, in any manner detract from their English education, their knowledge of Americanism, or their love of country? Why, then, the prohibition? In what "way," clear, direct or remote, does it tend to remedy the "manifest evil" or assist the melting pot? Appropriate methods of remedying the evil and of assisting the melting pot exist. Why, then, is a legislative act, which interferes with constitutional rights, to be upheld, and why the hesitancy to declare it unconstitutional? There is no reasonable relation between the evil and the act. The prohibition does not give the children a knowledge of the English language or an English education and it does not assist the melting pot. A foreign language is no more poisonous than the English language and anti-American sentiment can be taught in English as well as in a foreign language. The remedy must be affirmative and not negative. The majority opinion states the purpose, or "design," of the language act, as follows:

"The manifest design of this language statute is to supplement the compulsory education law by requiring that the branches enumerated to be taught shall be taught in the English language and in no other."

We have no complaint here. But every "branch enumerated" in the statute to be taught was "taught in the English language and in no other" in the defendant's school. The stipulation of facts so states. So the defendant met every purpose and "design" of the act as detailed by the majority. A foreign language, however, is not an "enumerated" branch. It is the prohibition of teaching a foreign language as an additional subject of which we complain, and the majority does not say that such prohibition was one of the designs of the act.

The prohibition of a foreign language study as an additional subject has no clear, real or substantial connection with the design of the act. Moreover, it has no plain, or appreciable tendency toward accomplishing the object of the act, which object this court says is that our children should be educated in English and should be taught Americanism and patriotism.

The majority holds that the legislature has attempted to remedy the evil and accomplish its "design" (1) by requiring that the compulsory branches be taught in English the same as they are required to be taught in the public schools, and (2) by prohibiting the study of a foreign language as an additional subject in the grades. Just how the prohibition or second element has any connection to the first or with the object or design is not explained in the opinion.

As already stated, we are firm in the belief that the state should require that private schools do at least as good work as the public schools are doing and that all compulsory branches be taught in English. The stipulation of facts admit that the requirement as to the English education was fully met by the defendant's school. That being admitted, the sole question is: Does the statute prohibit the study of a foreign language as an additional subject, especially where taught for a religious purpose, and if so, is such law constitutional? This is a question easily stated, if not easily decided.

To reiterate: The power of the state to require that pupils of private and parochial schools shall have all the advantages of an education in English and all of the advantages of learning Americanism and love of country that the public schools give, is undoubted. But what relation has the prohibition in question to the end? The remedy is not appropriate; it does not tend to accomplish the end.

Would not acts along the lines hereinafter suggested be appropriate?

For example, we have no doubt of the state's power to require that teachers of parochial schools be the holders of teachers' certificates qualifying them to teach in the public schools. Such a measure has not been enacted into law; we believe it should be. Further we have no doubt of the state's power to scrutinize the Americanism and moral character of those granted teachers' certificates more closely than it does, and respectfully suggest that the most effective method of insuring the teaching of Americanism and instilling in the child the love of country and intense patriotism would be by securing properly qualified teachers who are patriotic and who are American through and through. No other character of person is suitable to teach in any school in the state, public or private. Unfortunately we have no law putting this essential into practice. So far as a law can help the "melting pot" by education of the children, would not

such a law be clearly appropriate to the end, while prohibition is wholly inappropriate? While the state should not specify the actual text books to be used in the private schools any more than it does in the public schools, it might well require that those selected by the private schools be subject to the approval of state authorities to the end that the text books be proper and reasonably abreast of the times. We have no such law. Pupils in the private schools, just as pupils in the public schools, might be required to submit to periodical examinations by state authority. Within reasonable limits such a law properly administered would be helpful. We have no such law.

Doubtless other appropriate remedies to accomplish the ends men-

tioned by the majority might be suggested, but the above will suffice. Every one of those suggested has some clear relation to the end sought, and tends to remedy the evil found by the court, while the remedy of prohibition in the language act does not meet the constitutional test in any respect, and is clearly without value as a corrective measure.

A compulsory education law with requirement that the compulsory subjects be taught in English, is well enough as far as it goes, but while additional subjects are permitted, and necessarily must be permitted, the prohibiting of the teaching of a foreign language as an additional subject is adopting a means that does not accomplish the ends sought, and does not remedy the evil, but on the other hand such prohibition interferes with the rights, privileges and immunities of citizens, and so far as one subject is concerned, places a premium on ignorance and a ban on intelligence, and in our humble judgment, is un-American rather than anti-foreign.

We said above that the prohibition of a foreign language study as an additional subject places a premium on ignorance and a ban on intelligence. We mean just that. We will go further. It is a step economically wrong, tending to place America at a disadvantage in its commercial life. Economists and business men all recognize, and without dissenting voice, call attention to a fact, known by every thinking person, that if America expects to hold its own in foreign commerce, especially with the Latin countries, it must have citizens who know the language of those countries and are able to speak and read them intelligently. Not only must we have citizens who know such foreign languages, but they must learn the geography, history, virtues, vices, fads, and foibles of those to whom we seek to sell the products of the American farm and the American factory. No state may be of higher service to future American commerce than to offer in its public schools in the principal cities of the state an elective course in Spanish. The study might well be begun and continued through the grades. That it might be done without injury to the students' Americanism and patriotism and English education is too plain to require argument. True, in the instant case, the foreign language is German, but if the United States does not need elementary public schools teaching German, as we need them teaching Spanish, it is because our citizens of German extraction, to a limited extent, are giving the instruction in their private schools. The need of Spanish and French is a crying need recognized by all thinking men. If this language act means what the majority holds and is adopted by other states and enforced, the time soon will be here when we will have a like crying need for citizens knowing German. It admits of no argument that if we are to have citizens who know foreign languages, we must permit the study of the foreign languages in the grades. The study cannot begin too early. To wait until the high school or college will not accomplish the purpose. Few beginning the study at such time ever become proficient in the language.

That there is no reasonable connection between prohibiting the study of a foreign language as an additional subject and the object

of the act appears from other parts of the opinion. The majority further says:

"The evident purpose is that no other language shall be taught in any school, public or private, during the tender years of youth, that is, below the eighth grade, to the end (1) that pupils in our schools, public or private, shall be educated in the language of this country, so as to be able to read, write, and spell the same; (2) that time ordinarily devoted to such objects be not diverted to others; (3) that pupils be impressed in their youth that English is the language of this country, without a rival, even though another be spoken at home, and (4) that an education such as is given in the common schools be extended to pupils in the private schools and that  
69 the standard of education shall be uniform throughout the State.

Let us briefly consider these four ends separately:

(1) That pupils in our schools, public or private, shall be educated in the language of this country, so as to be able to read, write, and spell the same."

No one can take exception to this as being a proper subject for a law. If the compulsory branches, including English reading, are taught in English, with English as the medium of instruction and the standard in the compulsory branches is maintained, then are not the pupils "educated in the language of this country so as to be able to read, write, and spell the same?" Does an additional subject, even a foreign language subject, detract from that English education or ability "to read, write or spell?" If so, it would be interesting to have this court point out wherein exists such interference.

(2) The time ordinarily devoted to such object be not diverted to others."

In saying the above, does the majority realize that it has placed the ban upon domestic science, manual training, music, agriculture and even religion, since all are taught as additional subjects in the schools of the state, public and private, with the exception, of course, that religion is not taught in the public schools? The teaching of these additional branches divert- the attention of the pupils therefrom. The words of the majority may be proper if we have an understanding as to what constitutes the "time ordinarily devoted to such object."

The time ordinarily devoted to the object, we assume  
70 is sufficient to maintain a reasonable standard that enable the pupils to finish the grades and satisfactorily to master the compulsory subjects within the time ordinarily devoted to the grades. If that is what the majority means, we concur, but ordinarily this leaves a certain amount of time of the pupil to devote to additional subjects to be selected by the respective schools. And, may a foreign language be one of the additional subjects, and if not, why not?



"(3) That pupils be impressed in their youth that English is the language of this country, without a rival, even though another be spoken at home."

We have no quarrel with this statement; but does ability to read two languages have any tendency to prevent the impression "that English is the language of this country without a rival?" To accomplish that result is it necessary to prohibit a child from acquiring a reading and speaking knowledge of a foreign language? Is not the court here applying the ancient saw, "where ignorance is bliss 'tis folly to be wise?" If this is the intent of the language act, is the prohibiting of a foreign language study necessary to accomplish the results or even an appropriate means to that end?

"(4) That an education such as is given in the common schools be extended to pupils in the private schools and that the standard of education shall be uniform throughout the State."

Manifestly a standard of excellence equal to that in the common schools should be maintained in the private schools. We think that the children attending private schools are fairly entitled to  
71 obtain from them as much as they could obtain from the public schools in the same community. Not only did the defendant's school meet this end—but there is no reason why private schools generally should not meet it.

If legislation is required to secure the end, it must be appropriate thereto; it must be such as will bring the private schools to the standard by requiring teachers properly qualified educationally, patriotically and morally. Such end is not furthered by prohibiting the teaching a proper and useful language study which need not interfere in the slightest with the standard for an English education.

#### The Authorities.

We promise to cite authorities supporting the text in *Corpus Juris* hereinbefore quoted, as to limitations upon the police power, and they follow:

In *Buchanan v. Warley*, 62 Law Ed. 149 U. S., the Supreme Court of the United States in discussing the serious and difficult race problem, on page 163, used this pertinent language:

"That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control and to which it must give a measure of consideration may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges."

In *Lawton v. Steele*, 38 L. Ed. 385, at page 389, the Supreme Court of the United States, said:

72 "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with the private busi-



ness, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts."

In *Berea College v. Commonwealth of Kentucky*, 53 Law Ed. 81, Justice Harlan, speaking for certain members of the court, on page 90, said:

"The capacity to impart instruction to others is given by the Almighty for beneficent purposes; and its use may not be forbidden or interfered with by government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property,—especially, where services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States. This court has more than once said that the liberty guaranteed by the 14th Amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways.'"

In *Lochner v. New York*, 49 L. Ed. 937, the Supreme Court, on page 941, said:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contemplated for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?"

In *Truax v. Raich*, 60 L. Ed. 131, on page 135, the Supreme Court, said:

"It is no answer to say, as it is argued that the act proceeds upon the assumption that 'the employment of aliens, unless restrained, would

a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved."

74 In the instant case "it is no answer to say 'that the language act proceeds upon the assumption' that unless the study of a foreign language is prohibited in the grades the public welfare will be imperiled.

In *Yee Gee v. City*, 235 Fed. 757 is contained a somewhat elaborate discussion upon the limitations of the police power. On page 763 and 764, it is said:

"Is such a regulation within the rule of reason which must govern the courts in determining its validity? For that neither a municipality nor the Legislature of a state may competently interfere under the guise of a police regulation with the liberty of the citizen in the conduct of his business—legitimate and harmless in its essential character—beyond a point reasonably required for the protection of the public, is too thoroughly settled to call for any extended citation of authority in its support. And while at an earlier period the question of the reasonableness of regulatory measures was deemed more largely a legislative than a judicial one (*Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77), the more modern doctrine is that while every intendment is to be indulged in favor of the validity of an act of the Legislature of a state or of a city ordinance within the general power of the municipality to adopt, after all the question of the reasonableness of a regulatory measure in view of the apparent end sought is one for the courts to determine (*Dobbins v. Los Angeles*, *supra*, and cases there cited; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205). And the Supreme Court of California has fully recognized this principle. In *Ex parte Whitwell*, 98 Cal. 78, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152, in discussing the power of the courts in such cases, that court said:

"But it is not true that when this power is exerted for the purpose of regulating a business or occupation, which in itself is recognized as innocent and useful to the community, the Legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue such business or profession."

"Another principal involved in the exercise of the police power, which it is hardly necessary to state, is that a mere legislative declaration that a business or occupation, harmless and innocuous in itself, is inimical to the public interest, either as a whole or as to some feature of its conduct, cannot make it so, unless by reason of surrounding conditions the declaration can be said to accord with the fact as based upon common observation and human experience. The Legislature cannot by its mere ipse dixit make that a guilty thing which is intrinsically an innocent one. It would be idle, for in-

stance, for the Legislature to declare that the occupation of farming or the work of the horticulturist was in its nature inimical to the public interest, and to undertake to regulate the hours of the day in which the work of those great industries should be prosecuted. Such an attempt would, under existing conditions, at least, be treated only with derision, as falling wholly without the bounds of reason, and as involving a mere arbitrary attempt to interfere with the liberty of the citizen. In other words, any attempt at police regulation which interferes with the individual in the conduct of an innocent and legitimate business must have an appreciable relation to some public evil justly to be apprehended, and be reasonably calculated to avoid such evil. Beyond that the Legislature may not go."

In *People v. Steele*, 83 N. E. 236 (Ill.); 14 L. R. A. (N. S.) 361, on page 365, the court said:

"In *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611, it was held that, if the law prohibits that which is harmless in itself, or requires that to be done which does not tend to promote the health, comfort, safety, or welfare of society, it will in such case be — unauthorized exercise of power, and it will be the duty of the courts to declare such legislation void. In *Ritchie v. People*, 156 Ill. 98, 110, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454, 457, it was said: 'The police power of the state is that power which enables it to promote the health, comfort, safety, and welfare of society. It is very broad and far-reaching, but is not without its limitations. Legislative acts passed in pursuance of it must not be in conflict with the Constitution, and must have some relation to the ends sought to be accomplished; that is to say, to the comfort, welfare, or safety of society. Where the ostensible object of an enactment is to secure the public comfort, welfare, or safety, it must appear to be adapted to that end. It cannot invade the rights of person and property under the guise of a mere police regulation when it is not such in fact; and, where such an act takes away the property of a citizen or interferes with his personal liberty, it is the province of the courts to determine whether it is really an appropriate measure for the promotion of the comfort, safety, and welfare of society.'"

77 In *People v. Weiner*, 1916 C. L. R. A. 775, the Illinois court, on page 778, said:

"While the courts will not pass upon the wisdom of an act concerning the exercise of the police power, they will pass upon the question whether such act has a substantial relation to the police power."

The Court further said:

"It must have some relations and be adapted to the ends sought to be accomplished. Rights of property will not be permitted to be invaded under the guise of police regulations. *Bailey v. People*, 156

Ill. 28, 54 L. R. A. 838, 83 Am. St. Rep. 116, 60 N. E. 98. The court must be able to see, in order to hold that a statute or ordinance comes within the police power, that it tends in some degree toward the prevention of offenses or the preservation of the public health, morals, safety, or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose."

On the same page the Court further said:

"Under the Federal and State Constitutions the individual may pursue, without let or hindrance, all such callings or pursuits as are innocent in themselves and not injurious to the public. These are fundamental rights of every person living under this government, and the legislature by its enactment cannot interfere with such rights. *Fraser v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Chicago v. Netcher*, *supra*. The evidence shows that second-hand

78 bedding does not necessarily convey infectious or contagious diseases, and that a lawful business of selling or dealing in such may be carried on without danger to the public health.

The test of reasonableness required in a statute based on the police power as to whether it is in violation of the Constitution is whether in its attempted regulation, it makes efficient constitutional guaranties and conserves rights or is destructive of inherent rights. *Mehlos v. Milwaukee*, 156 Wis. 591, 51 L. R. A. (N. S.) 1009, 146 N. W. 882, Ann. Cas. 1915C, 1102. It is the nature of the previous use, condition, or exposure in respect to contagious or infectious diseases which makes the use of second-hand material dangerous in the manufacture of mattresses, comforters, and quilts, and not the mere fact of the previous use of such material by other persons. *Greensboro v. Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130, 2 So. 725. It is eminently proper to require that material be free from germs of contagion and infection before being used in mattresses, comforters, or quilts, whether the material be second-hand or new; but the possible danger to health or safety does not justify the absolute prohibition of a useful industry or practice where the danger can be dealt with by regulation."

The above case, which is supported by abundant authority, holds the doctrine that prohibition cannot be exercised under the guise of the police power where regulation will accomplish all legitimate ends. In such instance, the provisions of the act do not bear that clear relation to the end sought as to make it an appropriate remedy. In the instant case, laws insuring that children attending private schools will receive as good an English education as those attending public schools, will be upheld. Likewise laws insuring that the children in private schools will be taught patriotism and Americanism to the same extent as they are required to be taught in the public schools will be upheld. But to prohibit an additional subject such as a foreign language to be taught in a private school under the guise of providing that the children attending private schools shall receive an English education and shall be

taught Americanism, is passing the bounds of a proper police regulation and is invading the rights, liberties and immunities of the patrons and pupils of the schools and denying to the teacher his liberty of contract and right to a useful and harmless occupation.

The 14th Amendment to the Federal Constitution provides:

"\* \* \* No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law. \* \* \*

Article 1 of the Iowa Constitution provides:

"Rights of Persons. Section 1. All men, are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

"Religion. Sec. 3. The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates, for building or repairing places of worship, or the maintenance of any minister or ministry."

The defendant and his pupils are citizens and the above constitutional provisions protect, among others, the natural rights of man.

11 Corpus Juris, 800.

12 Corpus Juris, 934, Sec. 444.

We submit that the prohibition in the instant case is not valid under the police power, and that the same does abridge the privileges, immunities and rights of the defendant within the above constitutional provisions.

#### Classification.

We doubt that any good purpose could be served by argument that the classification in the act renders the same unconstitutional, and therefore content ourselves by again calling attention to *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 175 N. W. 530, page 535, second column, where the court said:

"If the law means that parents can teach a foreign language, private tutors employed by men of means may do so, but that poor men may not employ teachers to give such instruction in a class school, it would be an invasion of personal liberty, discriminatory and void, there being no reasonable basis of classification; but if such instruction can be given in addition to the regular course, and not so as to interfere with it, then equality and uniformity results, and no one can complain."

81 It seems to us that the Nebraska court is right. Our language act as construed by the majority does exactly what the Nebraska court condemns. The Nebraska court holds that if the law means what the majority says our law means, then it is unconstitutional, because there is no reasonable basis of classification. Indeed, we see no reason why, if a child below the ninth grade may be prohibited from studying a foreign language as an additional subject in a private school, where the same does not interfere with his English education, he may not be prohibited from studying a foreign language in the high school or in the college. Indeed, why, if he may be prohibited from studying it in a private school below the ninth grade, may he not be prohibited from studying a foreign language in the home or in the church? Grant the power of prohibition, then who shall say within what limits it may be exercised. If the child's knowledge of a foreign language was harmful, or, waiving that, more harmful than an adult's knowledge of the same language, then there might be some basis for classification. The prohibition is not necessary to insure any child's English education, love of country or patriotism. Regulations will do all of that. We submit, therefore, that the Nebraska court is right on this point, and the majority of our court is wrong.

82

## II.

## The Religious Question.

The able dissenting opinion of the Chief Justice in this case is a complete argument upon this branch of the case. No words of ours could carry as much weight as his and it is doubtful that we should do more than to rest this branch of the case upon what he has said. The following brief observations possibly are not out of place.

The majority admits that the statute is limited to secular subjects. The Chief Justice says:

"This concession is clearly necessary to save the constitutionality of the statute."

We are inclined to believe that the majority agree with the statement. However, if the majority agrees, as it apparently does, we cannot see how it upholds the general constitutionality of the statute. Under the constitution, a citizen's religious liberty is no more sacred than his civil liberty.

Mr. Justice Harlan, Mr. Justice Day concurring, in the Berea College case, 53 L. Ed. 81, on page, 91, said:

"Will it be said that the cases supposed and the case herein in hand are different, in that no government, in this country, can lay unholy hands on the religious faith of the people? The answer to this suggestion is that, in the eye of the law, the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law."

83



The argument of the dissenting opinion in the case at bar squarely refutes what the majority says about the reading in German being a secular branch. The object of the branch is, under the stipulation, admitted to be solely for a religious purpose. That the books used were secular in character rather than religious in character was merely incidental and in no way changed the purpose or object. The majority points out that other branches could reasonably "be used in the same way in connection with religious instruction or religious belief." This may be true. In the *Amana Society* case, this court pointed out that there was scarcely any occupation or business that might not be so used. In that case, the court, as then constituted, in holding that the mills, farms, live stock, factories and other properties and the activities of the Society were for a religious purpose, speaking through Mr. Justice Ladd, said:

"In ascertaining whether various properties of the society are for religious purposes, these should be viewed somewhat from the standpoint of its members. From that viewpoint its different enterprises are clearly within the rule stated by the Attorney General, that this must 'be convenient and appropriate to religious work and ceremonies and to the worship of God according to their belief'; for it is indispensable to their religious faith that they own their property in common and live a communal life. As a religious principle, 84 pal they have agreed to this and to devote their common labor to their common support."

If the test applied in the *Amana Society* case is sound, is it not a complete answer to the position of the majority in the instant case? If the same test does not apply, it seems that the majority should have distinguished the instant case from that one. If the test applied in the *Amana Society* case is erroneous, the majority should have frankly overruled it.

From what the majority has said, we take it that if the German reading text books instead of telling of Washington, Lincoln, Patrick Henry, and other men commonly told of in elementary reading text books, had told of Joseph, David, Solomon and Christ, and instead of containing lessons teaching honesty and morality and the ordinary virtues which are of advantage in material things, had contained lessons telling these same truths, in a religious vein, it would have been held that the reading books were religious in character and constituted a part of the religious instruction. Yet the teaching of the German reading in each instance would have been for the same identical purpose, viz., to enable pupils to acquire a sufficient reading knowledge in German to enable them intelligently to read the catechism, Bible and religious literature, and to take part intelligently in worship in the home and in the church in that language. In all this there seems to be considerable of hair-splitting and very little of real substance. We merely ask for a reconsideration of the religious question involved in this case in the light of the *Amana Society* case and of the *Trinity Church* case which are cited in the dissenting opinion of the Chief Justice.



## III.

## How the Constitutionality of the Statute May Be Saved.

Of course if it should be held that the German reading was taught in the instant case as a part of the religious instruction of the school, it would not be necessary to pass upon the constitutionality of the act in this case. However, that would not decide the question as to whether the statute was constitutional where a foreign language was taught under similar circumstances as a secular branch, which question sooner or later necessarily must be squarely met and decided.

While the letter of the language act may inhibit the teaching of a foreign language in the grades as a secular branch, we are of firm opinion that such is not the spirit of the act any more than it is in any other criminal statute where perfectly harmless and innocent acts are made a crime by the literal wording of the statute.

In our original brief we argued this proposition at some length and cited and quoted from cases holding that the intention to make an innocent and harmless act criminal is never to be imputed to any legislature. While such act may be within the letter of the statute, it is never within the spirit of the statute. A penal statute should not be applied to any case which does not fall both within its letter and its spirit.

Authorities sustaining the above rule are uniform. We cite a few:

State v. Gish, 168 Iowa, 70, 78.

State v. Botkin, 71 Iowa, 87-89.

Back v. Back, 148 Iowa, 223, 229.

Trinity Church v. United States, 36 L. Ed. 226, 228, 229.

De Hasque v. Railway Co., 173 Pac. 73.

We have read the majority opinion very carefully and can find nothing therein indicating that the majority finds or believes that either the welfare of the children or the peace, order and welfare of the state is injured in the slightest through a child or any other person, acquiring a reading and speaking knowledge of a foreign language, provided that the same is not acquired at the expense of his English education and his Americanism. The majority has not said, and surely does not believe, that any child or person is the worse off for knowing a foreign language where he also knows the English language, and has, or is acquiring an English education and has been or is being properly taught patriotism and Americanism.

If all compulsory branches are taught in English with English as the medium of instruction, including Americanism and patriotism, which is one of the compulsory branches, in what possible way can it be said that a child would be any better or more patriotic, or have any better command of English, or have any better English education, if, at the same time that he is getting his English education and in the same school and through the same teacher, he studies a foreign language as an additional subject?

The majority opinion contains nothing showing potential harm or wrongfulness under such circumstances. The language act is not aimed at the teacher, at the school, or at the text book. It is expected that children now being educated in private schools will continue to be educated in the same private schools, through the same text books and through the same teachers.

What we have said in discussing the constitutional question respecting the inherent innocence of learning a foreign language is applicable here, and for that reason we do not feel that anything further can be accomplished by continuing the argument.

In our opinion the serious doubt of the constitutionality of the statute, if the exception is not implied, is such as, under well recognized rules of statutory construction, compels the court to imply the exception, and therefore, to hold that the spirit of the act does not prohibit the teaching of a foreign language as an additional subject. Where the constitutionality of a statute is assailed, that rule is followed where possible whenever serious doubt as to constitutionality exists.

Hunter v. Coal Co., 175 Iowa, 245, 268 and 269, and authorities therein cited.

In Fox v. Washington, 59 L. Ed. 573, on page 575, the Supreme Court said:

88        "It is to be presumed that state laws will be construed  
           \* \* \* by state courts" in such way as to avoid doubtful constitutional question.

Manifestly, the rule well might be followed here and the exception implied in favor of the innocent and proper act of teaching a foreign language and thereby save all that there is of good in the language act, viz., the provision that requires all compulsory branches to be taught in English in private schools as well as in public schools. If the legislature is of opinion that anything further is required, it has the undoubted right to enact a law requiring that teachers of parochial schools be holders of certificates entitling them to teach in the public schools; that before anyone is granted a teacher's certificate, his Americanism and patriotism, as well as his educational qualifications be proved; that the text books used in private schools be subject to approval of state authority; and other remedial acts along such lines as will insure that children attending private schools receive all of the advantages of an English education and of learning to be loyal and patriotic citizens that they could possibly obtain through the public schools.

We believe that a re-examination of this case will disclose that the decision of the majority is wrong and that a rehearing should be granted.

Under the Fourteenth Amendment to the Federal constitution

the legislature may not select any means it chooses to remedy even a manifest evil. Before the means selected will stand the constitutional test, the court must be able to see that they bear the proper relation to the evil, and as a remedy, are appropriate to the end. Rights, privileges and immunities of citizens cannot be left to legislative caprice, or even serious error of judgment. There can be no doubt that this rule obtains when constitutionality is raised under the Fourteenth Amendment. We think the same rule obtains when the attack is under our state constitution.

The statute does not apply to religious subjects or to subjects taught for religious purposes. In this case the holding should be that the foreign language was taught as a part of the religious instruction and for a religious purpose, and that therefore the act with which the defendant is charged is not even within the letter of the statute.

Even if the foreign language was taught purely as a secular branch, nevertheless under the circumstances in the instant case, such teaching was harmless and innocent, and therefore not within the spirit of the language act, although possibly within its letter. Therefore, an exception in favor of the innocent and harmless act of the defendant should be implied in accordance with the rules implying such exceptions where the strict letter of the law makes an innocent act criminal. This rule is especially applicable in this case because of the serious doubt of constitutionality if the statute is not so construed. By implying the exception, all of the provisions of merit in the statute may be saved.

Respectfully submitted,

PICKETT, SWISHER & FARWELL,  
F. P. HAGEMANN,

*Attorneys for Appellant.*

We hereby certify that the actual cost of printing the foregoing petition for rehearing is \$—.

PICKETT, SWISHER & FARWELL,

*Attorneys for Appellant.*

Notice is hereby given that at the submission of the petition for rehearing, appellant will ask to be heard in oral argument.

PICKETT, SWISHER & FARWELL,

*Attorneys for Appellant.*

91 STATE OF IOWA, ss.:

Supreme Court of Iowa.

Be it remembered on the 21st day of June, 1921, the following proceedings, among others, were had in the Supreme Court of Iowa, to wit:

THE STATE OF IOWA, Appellee,

vs.

AUGUST BARTELS, Appellant.

Appeal from Bremer District Court.

This cause is submitted on Appellant's Petition for Rehearing on file and oral argument of counsel.

I hereby certify that the foregoing is a full, true and complete copy of the Record entry of said Court in the above entitled case as full, true and complete as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Des Moines, this 26th day of July, A. D. 1921.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT,

*Clerk of Supreme Court of Iowa.*

92 STATE OF IOWA, ss:

Supreme Court of Iowa.

Be it Remembered that on the 25th day of June, 1921, the following proceedings, among others, were had in the Supreme Court of Iowa, to wit:

THE STATE OF IOWA, Appellee,

vs.

AUGUST BARTELS, Appellant.

Appeal from Bremer District Court.

Appellant's Petition for Rehearing having been fully considered is overruled.

I hereby certify that the foregoing is a full true, and complete copy of the Record entry of said Court in the above entitled case as full, true and complete as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Des Moines, this 26 day of July, A. D. 1921.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT,

*Clerk of Supreme Court of Iowa.*

93 Filed Jul. 26, 1921. B. W. Garrett, Clerk Supreme Court.

AUGUST BARTELS, Plaintiff in Error,

vs.

THE STATE OF IOWA, Defendant in Error.

*Writ of Error.*

UNITED STATES OF AMERICA, ss.:

The President of the United States to the Honorable Judges of the Supreme Court of the State of Iowa, Greeting:

Because in the records and proceedings, as also in the rendition of a judgment on a plea which is in said Supreme Court of Iowa, being the highest court of law or equity of said State in which a decision could be had in said suit between the State of Iowa, plaintiff, and August Bartels, defendant, wherein was drawn a question of right or privilege set up and claimed under the Constitution of the United States, and the decision of said court was against the right and privilege as set up and claimed, and wherein was drawn in question the validity of a statute of the State of Iowa and amendments thereto on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of the validity of such statutes and amendments, a manifest error has happened to the great damage of the said August Bartels, as by his complaint appears.

We, being willing that error, if any hath been, should be corrected and full and speedy justice done to the parties aforesaid in his behalf, do command you, if judgment be therein given, that when under your seal distinctly and openly you send the records and proceeding aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C. within thirty (30) days after the date of signing the citation therein, in the said Supreme Court to be then and there held. That the records and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court, the 26th day of July, 1921.

[Seal U. S. District Court, District of Iowa.]

WM. C. MCARTHUR,

*Clerk of the District Court of the United States  
in and for the Southern District of Iowa,*

By GERTRUDE DARRELL,

*Deputy.*

Allowed, July 26th, 1921.

W. D. EVANS,

*Chief Justice of the Supreme Court of Iowa.*

95 Filed Jul- 26, 1921. B. W. Garrett, Clerk Supreme Court

In the Supreme Court of Iowa.

AUGUST BARTELS, Plaintiff in Error,

vs.

THE STATE OF IOWA, Defendant in Error.

*Assignment of Errors.*

Now comes the above named August Bartels, plaintiff in error, the above entitled cause (named as defendant in the State court and in connection with his petition for writ of error makes this assignment of errors.

The Supreme Court of Iowa erred in holding and deciding that Section 1 of Chapter 198 of the Acts of the 38th General Assembly of Iowa (Session Laws of Iowa, 1919) was valid. The validity of said Section was denied and drawn in question by the plaintiff in error on the ground of its being repugnant to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth, as follows:

The Supreme Court of Iowa erred in holding and deciding:

First. That said Section 1 did not abridge the privileges and immunities of citizens of the United States or of this plaintiff in error as guaranteed by the Fourteenth Amendment to the Federal Constitution.

Second. That said Section 1, as applied to this plaintiff in error did not deprive him of liberty and property without due process of law contrary to the provisions of the said Fourteenth Amendment of the Federal Constitution.

96

CHARLES E. PICKETT,

*Attorney for Plaintiff in Error.*

AUGUST BARTELS,

By C. E. PICKETT,

PICKETT, SWISHER & FARWELL AND

F. P. HAGEMANN,

*His Attorneys.*

The above assignment of errors was presented to me with the petition for writ of error. The Clerk of the Supreme Court of Iowa was directed to file the same as one of the papers in this proceeding to procure a writ of error.

Dated July 26th, A. D. 1921.

W. D. EVANS,

*Chief Justice of the Supreme Court of Iowa.*

97 Filed Jul- 26, 1921. B. W. Garrett, Clerk Supreme Court.

In the Supreme Court of Iowa.

AUGUST BARTELS, Plaintiff in Error,

vs.

THE STATE OF IOWA, Defendant in Error.

*Petition for Writ of Error.*

To the Honorable William D. Evans, Chief Justice of the Supreme Court of Iowa:

Plaintiff in error, considering himself aggrieved by the final decision of the Supreme Court of Iowa in rendering judgment against him in the above cause, which in the State court was entitled State of Iowa v. August Bartels, and by the decision in said Supreme Court denying and overruling his petition for a rehearing in said cause, shows, by this petition, that in the records, proceedings, and decision in the said Supreme Court of the State of Iowa, the same being the highest court of said state in which a decision could be had in this case, a manifest error has occurred greatly to the damage of the said August Bartels, plaintiff in error.

That the original judgment was rendered and opinion filed in the Supreme Court of Iowa on February 12, 1921; and the petition for rehearing was filed, presented, argued and submitted in accordance with the statutes, rules and practice in said court, and due notice thereof given, and the final decision upon said petition for rehearing entered on the 25th day of June, A. D. 1921.

That as appears in the records and proceedings in said Supreme Court of Iowa, there was drawn in question whether Section 1 of Chapter 198 of the Acts of the 38th General Assembly of Iowa was repugnant to the Constitution of the United States and in contravention thereof, and whether the rights, privileges and immunities of the plaintiff in error, as a citizen of the United States, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, were abridged by said statute, and whether he was thereby denied and deprived of his liberty and property without due process of law; all of which fully appears in the records and proceedings of the case, and is specifically set forth in the assignment of errors filed herewith.

Wherefore, plaintiff in error prays that writ of error be allowed therefrom to the Supreme Court of the United States; that a transcript of records, proceedings and papers upon which said judgment was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington D. C., under the rules of such court in such cases made and provided, and that the same may be by said Honorable Court inspected and corrected in accordance with law and justice, and that an order fixing the amount of a super-



sedes bond be made, and also for such other orders and process as it may be necessary to secure a review of said judgment in the Supreme Court of the United States.

AUGUST BARTELS,  
By PICKETT, SWISHER, FARWELL,  
F. P. HAGEMANN,  
*His Attorneys.*

CHARLES E. PICKETT,  
*Atty. for Plaintiff in Error.*

Upon consideration, the within petition is granted, and it is ordered that a writ of error, as prayed, be, and the same is, hereby allowed, which shall issue upon the petitioner giving bond with appropriate conditions, as by law provided, in the sum of \$1,000, which said bond shall operate when approved as a supersedeas.

Dated July 26th, A. D. 1921.

W. D. EVANS,  
*Chief Justice of the Supreme Court of Iowa.*

99 Filed July 26, 1921. B. W. Garrett, Clerk Supreme Court.

In the Supreme Court of Iowa.

AUGUST BARTELS, Plaintiff in Error,

vs.

THE STATE OF IOWA, Defendant in Error.

*Bond for Costs and to Stay Execution.*

Know all men by these presents:

That I, August Bartels, as principal, and A. C. Grossman and C. Hoppenworth, as sureties, are held and firmly bound unto the State of Iowa in the sum of One Thousand Dollars (\$1,000.00) for the payment of which well and truly to be made we bind ourselves jointly and severally:

Whereas, the above named plaintiff in error seeks to prosecute his writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above written action by the Supreme Court of the State of Iowa, which cause in the State court was entitled State of Iowa v. August Bartels:

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and shall answer all costs that have been or may be adjudged against him, and if the said August Bartels shall satisfy and perform the judgment of the court now or hereafter in said cause rendered

against him in case he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

Dated this 26 day of July, A. D. 1921.

AUGUST BARTELS,  
*Principal.*

A. C. GROSSMAN,  
CARL HOPPENWORTH,  
*Sureties.*

100 THE STATE OF IOWA,  
*Bremer County, ss:*

A. C. Grossman and Carl Hoppenworth, sureties named in the above bond, being duly sworn, each says:

That he is a resident of the County of Bremer, Iowa; that he is a freeholder and is worth double the sum secured by said bond beyond the amount of his debts and has property liable to execution in this state equal to the sum covered by this bond.

A. C. GROSSMAN.  
CARL HOPPENWORTH.

Subscribed and sworn to before me this 26 day of July, A. D. 1921.

[SEAL.]

F. P. HAGEMANN,  
*Notary Public in and for Bremer County, Ia.*

STATE OF IOWA,  
*Bremer County, ss:*

I, I. E. Smith, Clerk of the District Court of Iowa in and for Bremer County, hereby certify that I am personally acquainted with the sureties on the within bond and with their responsibility, and that if said bond were presented to me for approval, as such Clerk, I would approve and accept the same.

Witness my hand and the seal of court affixed this 26 day of July, A. D. 1921.

[SEAL.]

I. E. SMITH,  
*Clerk of the District Court of Iowa  
in and for Bremer County,*  
By F. W. SMITH,  
*Deputy.*

The within bond and sureties thereon are this day approved and said bond ordered hereby to operate as a supersedeas.

Dated July 26, A. D. 1921.

W. D. EVANS,  
*Chief Justice of the Supreme Court of Iowa.*

101

Supreme Court of the United States.

AUGUST BARTELS, Plaintiff in Error,

vs.

THE STATE OF IOWA, Defendant in Error.

*Prayer for Reversal.*

To the Honorable Supreme Court of the United States:

Now comes August Bartels, plaintiff in error, and prays for a writ of error from the judgment of the Supreme Court of the State of Iowa in a criminal action brought by the State of Iowa against August Bartels in the District Court of Bremer County, Iowa, on the 7th day of January, 1920, which judgment was, on appeal, affirmed by the Supreme Court of Iowa, and judgment therein rendered against plaintiff in error for costs, the opinion being adhered to on petition for rehearing, which petition was overruled on the 25th day of June, 1921, the said judgment and order on petition for rehearing being each rendered and properly entered of record by the said Supreme Court of Iowa, and plaintiff in error, having theretofore, on the 26th day of July, 1921, filed its assignment of errors with the Chief Justice of the Supreme Court of Iowa, and duly lodged the same with the Clerk of said court. The plaintiff in error also prays that the said judgment and order of the Supreme Court of Iowa, dated the 12th day of February, 1921, be reversed, and that a judgment be rendered in his favor against the defendant for costs, and the cause remanded to the Supreme Court of Iowa for proper proceedings in the premises.

AUGUST BARTELS,  
By C. E. PICKETT,  
PICKETT, SWISHER & FARWELL, ATTORNEYS,  
F. P. HAGEMANN.

CHARLES E. PICKETT,  
*Attorney for Plaintiff in Error.*

STATE OF IOWA, ss:

Supreme Court.

Let a writ of error issue upon the execution of a bond by August Bartels in the sum of \$1,000.00, conditioned as required by law, said bond, when approved, to act as a supersedeas.

Dated at Chambers, Des Moines, Iowa, July 26th, A. D. 1921.

W. D. EVANS,  
*Chief Justice of the Supreme Court of Iowa.*

102 Filed Jul. 26, 1921. B. W. Garrett, Clerk Supreme Court.

In the Supreme Court of Iowa.

AUGUST BARTELS, Plaintiff in Error,

vs.

THE STATE OF IOWA, Defendant in Error.

*Citation.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the State of Iowa, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Iowa, wherein August Bartels is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done for the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Iowa this 26th day of July, A. D. 1921.

[Seal of the Supreme Court of Iowa.]

W. D. EVANS,

*Chief Justice of the Supreme Court of Iowa.*

Attest:

B. W. GARRETT,

*Clerk of Supreme Court of Iowa.*

Des Moines, Iowa, July 26th, 1921.

I, Ben J. Gibson, Attorney General of Iowa, and attorney of record for the State of Iowa, defendant in error in the above entitled case, hereby accept and acknowledge due and legal service of the above citation and enter an appearance in the Supreme Court of the United States.

BEN J. GIBSON,

*Attorney General of Iowa.*

103

*Certificate of Lodgment.*

STATE OF IOWA, ss:

## Supreme Court.

I, B. W. Garrett, Clerk of the above named court, do hereby certify there was lodged with me as such Clerk on July 26th, A. D. 1921, in the cause entitled August Bartels, plaintiff in error, v. The State of Iowa, Defendant in error, (said cause in the Supreme Court of Iowa being entitled State of Iowa, Appellee, v. August Bartels, Appellant):

1. The original bond on Writ of Error, of which copies are herein set forth.
2. The original and two copies of the Writ of Error, as herein set forth, one for the Defendant in Error and one filed in my office.
3. The original and two copies of the Assignment of Errors.
4. Original and two copies of the Petition for Writ of Error.
5. The original and two copies of the Prayer for Reversal.
6. The original and two copies of the Citation with the acceptance of service thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of this court in my office at Des Moines, Iowa, this 26th day of July, A. D. 1921.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT,  
*Clerk of Supreme Court of Iowa.*

104

*Certificate.*

STATE OF IOWA, ss:

## Supreme Court.

I, B. W. Garrett, Clerk of the above named court, do hereby certify that the above and foregoing is a true, full and complete transcript of the record and proceedings in the cause numbered in said court 33509, State of Iowa, Appellee, v. August Bartels, Appellant, and also the opinion of the court rendered therein (also the dissenting opinion) as the same now appears of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Des Moines, Iowa, this 26th day of July, A. D., 1921.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT,  
*Clerk of the Supreme Court of Iowa.*

105

AUGUST BARTELS, Plaintiff in Error,

vs.

THE STATE OF IOWA, Defendant in Error.

*Return to Writ of Error.*

UNITED STATES OF AMERICA,  
*Supreme Court of Iowa, ss:*

In obedience to the within Writ of Error, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the Supreme Court of Iowa in the city of Des Moines, this 26th day of July, A. D., 1921.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT,  
*Clerk of the Supreme Court of Iowa.*

Costs of transcript, \$—, paid by August Bartels.

Endorsed on cover: File No. 28,400. Iowa Supreme Court. Term No. 445. August Bartels, plaintiff in error, vs. The State of Iowa. Filed August 1st, 1921. File No. 28,400.

(4604)





Office Supreme Court, U. S.

**FILED**

**APR 2 1922**

**WM. R. STANSBURY**

**CLERK**

IN THE

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1922.**

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**No. 134.**

---

AUGUST BARTELS, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF IOWA.

---

IN ERROR TO THE SUPREME COURT OF THE STATE  
OF IOWA.

---

**BRIEF OF AUGUST BARTELS, PLAINTIFF IN ERROR**

---

CHARLES E. PICKETT,

*Attorney for August Bartels, Plaintiff in Error.*

FRANK E. FARWELL,  
BENJAMIN F. SWISHER,  
FRED B. HAGEMANN,

*Of Counsel.*

**(28,400)**

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IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1922.

---

**No. 134.**

---

AUGUST BARTELS, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF IOWA.

---

IN ERROR TO THE SUPREME COURT OF THE STATE  
OF IOWA.

---

**BRIEF OF AUGUST BARTELS, PLAINTIFF IN ERROR**

---

**Statement of the Case.**

The plaintiff in error was convicted in the State court of a violation of chapter 198 of the Acts of the 38th General Assembly of Iowa, which purports to prohibit the use of any language other than English in teaching secular subjects in the public or private schools of the State of Iowa.

From such conviction and sentence thereon the plaintiff in error appealed to the Supreme Court of Iowa, which court affirmed the conviction by a divided court, four to three on February 12, 1921. (See opinion and dissenting opinion, pages 12-29 of the printed Transcript of Record. Opinion is also found in 191 Iowa, 1060.)

Plaintiff in error (defendant below) filed his petition for rehearing in the Iowa Supreme Court, which was overruled on June 25, 1921 (printed Record, page 52). The petition and argument in support thereof is reprinted in the Transcript, pages 31-51.

The plaintiff in error brings the case to this court upon a writ of error, which was allowed by the chief justice of the Supreme Court of Iowa on July 26, 1921 (Record, 53-60).

Among other questions involved in the Iowa courts was whether the statute which plaintiff in error was convicted of violating is void under the Fourteenth Amendment to the Constitution of the United States. The sole question involved in this court is the said constitutional question.

### *Iowa Language Act.*

The said statute is chapter 198 of the Acts of the 38th General Assembly of Iowa (Session Laws, 1919) and reads as follows:

*An Act Requiring the Use of the English Language as the Medium of Instruction in All Secular Subjects in All Schools Within the State of Iowa.*

*Be it enacted by the General Assembly of the State of Iowa:*

SECTION 1. That the medium of instruction in all secular subjects taught in all of the schools, public

and private, within the State of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited, provided, however, that nothing herein shall prohibit the teaching and studying of foreign languages as such as a part of the regular school course in any such school, in all courses above the eighth grade.

SECTION 2. That any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100.00).

Approved April 10, A. D. 1919.

The charge against the plaintiff in error was made by information, the charging part of which is as follows:

*Information.*

The defendant (plaintiff in error) is accused of the crime of using a language other than English as the medium of instruction in a secular subject in a private school in Iowa taught to scholars below the eighth grade.

For that the defendant (plaintiff in error) about the tenth day of November, 1919, at the township of Maxfield, in the county and State aforesaid, did use a language other than English, to wit, the German language, as a medium of instruction in the teaching of a secular subject, to wit, reading, to Selman Steege, Cordelia Griesse and Lawrence Phipo, the said persons then and there being scholars in a private school in the aforesaid township, county and State, and receiving said instruction below the eighth grade in said school from said defendant, who was then and there

a teacher in said school, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Iowa.

The original trial was in justice court and resulted in the conviction of the plaintiff in error and a fine of \$25.00 and costs (Record, 3). Plaintiff in error appealed to the District Court of Bremer County, Iowa, where the case was tried *de novo* and resulted in conviction and a fine of \$25.00 and costs (Record, 10). This is the judgment that was affirmed by the Iowa Supreme Court.

### *The Facts.*

The facts upon which the case was tried were stipulated and agreed to by the parties (Printed Record, 4 to 8). Said stipulation of facts is as follows:

"It is stipulated between the State of Iowa and August Bartels, defendant, that the following is a true and correct statement of the facts involved in the case, and that the case shall be tried and determined upon said facts without the introduction of any other testimony therein, said facts being as follows, to wit:

First. That St. John's Evangelical Lutheran Church is a rural church located in Maxfield township, Bremer county, Iowa; that the church corporation owns and uses a church edifice and parochial school building and other property in connection therewith of the reasonable value of approximately \$40,000.00, and at the present time has a congregation of approximately three hundred with two hundred communicants; that it is a religious organization affiliated with the Evangelical Lutheran Synod



of Iowa and other States, and that the said church and its parochial school have been continuously supported and maintained by the members for religious purposes in accordance with the beliefs and practices of the said Evangelical Lutheran Synod of Iowa and other States. That among the beliefs and practices of the said church and the Synod with which it is affiliated is the belief and practice of having the children of the members and communicants attend its parochial school until after their confirmation and acceptance into the church as communicants thereof, and that the object and purpose of the parochial school is to give the said children of the members and communicants a Christian education in the catechism, beliefs and practices of the said church at the same time that they are receiving their secular education in the common branches, and to conduct daily in said school devotional exercises in accordance with said beliefs and practices.

Second. That the children attending said school are the children of the communicants and members of the aforesaid church, and that the present school attendance is, and for some years has been, approximately thirty-six pupils, of the ages between six and thirteen years, both inclusive; that the said parochial school is in session thirty-six weeks of five days each, with school hours from nine o'clock a. m. to twelve noon, and from one o'clock p. m. to four o'clock p. m. each school day, beginning about the middle of September and ending about the middle of the following June, with the ordinary holiday vacations; that ordinarily the children of the school are confirmed and received into the church on attaining the age of thirteen years, at which time said pupils are expected to, and as a rule have completed the seventh grade in the common-school branches mentioned in paragraph

three hereof, and that as a rule the pupils of the school, after completing the seventh grade and being confirmed, attend the public schools in the same community, entering the eighth grade of the said public schools; that the school year in the parochial school is a month or more longer than is the school year in the public schools of the same community.

Third. That the secular branches taught in said parochial school, to wit, the common-school branches of reading, writing, spelling, arithmetic, grammar, geography, American citizenship, physiology and United States history, are taught and, for a number of years, have been taught in the English language with English as the medium of instruction; and that the text books used in said subjects are the same text books used in the public schools in said community, and that the instruction given in the aforesaid common branches is equivalent and, in all respects, is substantially the same as the instruction given in the said common branches in the public schools in said community.

Fourth. That the defendant, August Bartels, is the duly appointed, employed and acting teacher of the aforesaid parochial school, and has been the teacher of said parochial school continuously during the last five years; that said defendant is a competent teacher possessing the necessary qualifications and moral character for that purpose.

Fifth. That the members and communicants of the aforesaid church and the children attending the aforesaid parochial school are of foreign extraction; that all of said members and communicants, whether immigrants, or born in this country, and this defendant and the children attending the parochial school, are citizens of the State of Iowa and of the United States,

either by reason of their birth in this country, or by reason of their naturalization or the naturalization of their parents, as, and in the manner, provided by law.

Sixth. That the members and communicants of said church have always been accustomed to worship in the church and have devotional exercises in the home in the German language and that the devotional exercises and religious instruction of the children in said parochial school for many years was exclusively in the German. During recent years religious instruction in the said parochial school has been and is now given in both the English and German languages. This instruction has been given in this way in order that the children might be able to participate intelligently with their parents in religious worship in the home and in the church. It is done also for the purpose of enabling the parents to supplement the religious instruction of the school by instruction in religion and morals in the home. It is the desire of the parents of the children who are in attendance at said school that their children be given instruction in religious matters in the German language and that the children acquire a sufficient knowledge of the German language to enable them to read intelligently the church catechism and the Bible in the German.

Seventh. That a part of the communicants and members of the aforesaid church have insufficient knowledge of the English language to freely and clearly receive or impart instruction in the matter of religion and morals, or to take part with the same freedom and the same understanding in religious or devotional exercises conducted in the English language that they would in the German; that among the duties enjoined by said church and which are the beliefs and practice of the communicants of said church whose

children are now attending the aforesaid parochial school, are the duties of assembling with the members of their families and attending at stated periods devotional services conducted in the home and of attending with their children religious services conducted in said church, consisting of sermons, instruction in matters of faith and religion, the singing of hymns and other religious and devotional exercises usual in Protestant Christian churches. That knowledge of the catechism is essential to confirmation in the church and that it is the belief of the members and communicants of said church, whose children are now attending the aforesaid parochial school, that the training of their children in religion and in Christian citizenship will be materially and irreparably interfered with unless the said children learn to read the language used by the parents in worship in the church and the home. That it is the belief of the said church and the members and communicants thereof, that children should be prepared for confirmation at about the time they complete the seventh grade in the secular branches, or when they have attained the age of thirteen years. It is also the belief of the members and the communicants of the said church that parents will not be able to perform their full Christian duty toward their children in accordance with the beliefs and practices of the church if they are unable to supplement the religious training of their children through admonitions and worship at the home conducted by the parents in the German language in which they are accustomed to worship.

Eighth. That on November 10, 1919, and upon each school day during the present school year beginning about the middle of September, 1919, up to the time of the filing of the information in this case, the

defendant, August Bartels, in addition to teaching through the medium of the English language the common-school branches mentioned in paragraph three hereof (including among said common-school branches English reading by the use of English text books) did teach in said parochial school reading in the German language to the pupils of said school, to wit, Selma Steege, Cordelia Griese and Lawrence Phipo, and to the other pupils in said school whose names are not herein set out. That the said pupils to whom reading was taught in the German language were of the ages between six and thirteen years, inclusive, and were below the eighth grade. That the text books used in teaching reading in the German language to said pupils were printed in the German language and contained such reading lessons as ordinarily appear in elementary reading text books printed in the English language and used in the public schools of the State, and are hereby admitted to be of a secular character rather than of a religious character. German was used as the medium of instruction by the defendant in teaching reading of the German language. That said German reading was taught at the request and with the full consent of the parents of said children and for the purpose of teaching the said children to read the German language sufficiently to enable them intelligently to read the catechism and Bible in that language and to understand religious instruction when given in said language and to take part in religious services conducted in said language in the church and Sunday School and in the home.

The opinion of the Supreme Court of Iowa appearing in the Printed Record on pages 12-29 (191 Iowa, 1060) as well as the specification of errors in the petition for rehearing filed in the State Supreme Court

(beginning page 32 of the Printed Record) and the motion for dismissal of the case filed in the trial court (pages 8 and 9 of Printed Record) show that the question of constitutionality of the language act under the 14th Amendment to the Federal Constitution was raised in the trial and supreme courts and passed upon by said courts, and the validity of the act upheld.

The Iowa language act and the Iowa compulsory education laws, for convenience of reference, are copied in full in the first division of "Points and Authorities," following the "Specification of Errors."

### **Specification of Errors.**

(1) The Supreme Court of Iowa erred in holding and deciding that section 1, chapter 198, of the Acts of the 38th General Assembly of Iowa (Session Laws, 1919) was valid. The said section is as follows:

SECTION 1. That the medium of instruction in all secular subjects taught in all of the schools, public and private, within the State of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited; *provided, however*, that nothing herein shall prohibit the teaching and studying of foreign language as such as a part of the regular school course in any such school, in all courses above the eighth grade.

The validity of said section was denied and drawn in question in the said Supreme Court of Iowa and in the trial court by the plaintiff in error on the ground of its being repugnant to the Constitution of the United States, and particularly in that it was in contravention of the 14th Amendment to the said Constitution.

(2) The Supreme Court of Iowa erred in holding and deciding that the section 1 of said chapter 198, Acts 38th General Assembly, quoted above, did not abridge the privileges and immunities of citizens of the United States or of the plaintiff in error as guaranteed by the 14th Amendment to the Federal Constitution.

(3) The Supreme Court of Iowa erred in holding and deciding that said section 1, quoted above, as applied to the plaintiff in error in this case, did not deprive him of liberty and property without due process of law contrary to the provisions of the said 14th Amendment to the Federal Constitution.

(The assignment of errors upon which the writ of error was issued appears on page 54 of the record.)

### **Points and Authorities.**

#### **I.**

For convenience we copy the Iowa language act and compulsory education laws.

#### *Language Act.*

SECTION 1. That the medium of instruction in all secular subjects taught in all of the schools, public and private, within the State of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited; *provided, however,* that nothing herein shall prohibit the teaching and studying of foreign languages as such as a part of the regular school course in any such school, in all courses above the eighth grade.



SECTION 2. That any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100.00).

Chap. 198, Acts 38 General Assembly (Session Laws of Iowa, 1919).

*Compulsory Education Law.*

*Iowa Code Supplement 1913.*—SECTION 2823-a. Any person having control of any child of the age of seven to sixteen years inclusive, in proper physical and mental condition to attend school, shall cause such child to attend some public, private, or parochial school, where the common school branches of reading, writing, spelling, arithmetic, grammar, geography, physiology, and United States history are taught, or to attend upon equivalent instruction by a competent teacher elsewhere than school, for at least twenty-four consecutive school weeks in each school year, commencing with the first week of school after the first day of September, unless the board of school directors shall determine upon a later date which date shall not be later than the first Monday in December; but the board of school directors in any city of the first or second class may require attendance for the entire time the schools are in session in any school year. *Provided* that this section shall not apply to any child who lives more than two miles from any school by the nearest traveled road except in those districts in which the pupils are transported at public expense, or who is over the age of fourteen and is regularly employed; or has educational qualifications equal to those of pupils who have completed the eighth grade; or who is excused for sufficient

reasons by any court of record or judge thereof; or while attending religious service or receiving religious instructions. Any person who shall violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than three dollars nor more than twenty dollars, for each offense.

*Teaching American Citizenship Required.*

SECTION 1. All public and private schools located within the State of Iowa shall be required to teach the subject of American citizenship.

Chap. 406, Acts 38 General Assembly (Session Laws of Iowa, 1919).

*Statute Requiring Instruction in Public Schools to be Given in English.*

Iowa Code, 1897.—SECTION 2749. The voters assembled at the annual meeting shall have power:

\* \* \* \* \*

(3) To determine upon added branches that shall be taught, but instruction in all branches except foreign languages shall be in English.

II.

*Rights of Parents and Private Schools.*

1. It is a fundamental right of parents to bestow upon their children a full measure of education in addition to the compulsory education required by the State, provided that

the additional branches do not interfere with public welfare or health.

Columbia Trust Co. v. Lincoln Institute, 29 L. R. A. (N. S.), 53 Ky.

Berea College v. Kentucky, 211 U. S., 45; 53 L. Ed., 81, especially dissenting opinion.

Meyer v. State, 187 N. W., 100 (Neb.), dissenting opinion.

2. There is a well-recognized distinction between the power of the State over its public schools and its power over private schools. Laws governing instruction in private schools can be upheld only where the public welfare, safety, health, or morals are involved, with the further limitation that the regulation must be reasonable and necessary to accomplish the end sought.

24 Ruling Case Law, page 562, section 5, and authorities, *supra*.

### III.

#### *Police Power.*

1. The Iowa language act as construed by the Supreme Court of Iowa cannot be upheld under the police power in that the right of the plaintiff in error to teach German to his pupils, under the circumstances shown in this case, is a substantial right of property and beyond question part of his liberty as guaranteed against hostile State action by the 14th Amendment to the Constitution of the United States.

24 Ruling Case Law, page 562, section 5.

Berea College v. Commonwealth, 211 U. S., 45, 67, 53 L. Ed., 81, 90.

Meyer v. State, 187 N. W., 100; dissenting opinion, 104.

2. The mischief the language act was intended to remedy is ignorance of English and not knowledge of a foreign language. The remedy, in so far as it prohibits the teaching of a foreign language in the elementary private schools, is not within the police power for the reason that the same is not "reasonably necessary for the accomplishment of the purpose."

Lawton v. Steele, 152 U. S., 133; 38 L. Ed., 385, 388.

12 *Corpus Juris*, 929, section 441.

Columbia Trust Co. v. Lincoln Institute, 29 L. R. A. (N. S.), 53 Ky.

Buchanan v. Warley, 245 U. S., 60, 81; 62 L. Ed., 149, 163.

Lochner v. New York, 198 U. S., 45, 56; 49 L. Ed., 937, 941.

Traux v. Raich, 239 U. S., 33, 41; 60 L. Ed., 131, 135.

Yee Gee v. City, 235 Federal, 757, 763, and 764.

People v. Steele, 83 N. E., 236 (Ill.); 14 L. R. A. (N. S.), 361, 365.

People v. Weiner, L. R. A., 1916 C, pages 775, 778 (Ill.).

3. Not only does the Iowa language act infringe upon the civil rights and privileges of our citizens, but it infringes upon their religious liberties.

Church of the Holy Trinity v. United States, 143 U. S., 457; 36 L. Ed., 226.

State v. Amana Society, 132 Iowa, 304.

Columbia Trust Co. v. Lincoln Institute, 29 L. R. A. (N. S.), 53 Ky.

Dissenting Opinion Instant Case, 191 Iowa, 1074.

## IV.

*Classification.*

The classification in the language act is without reasonable basis, in that the inhibition applies only to schools below certain grades, whereas foreign languages may be freely taught the same children by parents, tutors, or others in any place and under any circumstances other than in the school. Moreover, there is no attempt to control the character of teacher, text-book, or school; the inhibition applies only to foreign languages.

Neb. Dist. E. L. S., 175 N. W., 531, 535.

Adams v. Tanner, 244 U. S., 590, 596; 61 L. Ed., 1336, 1343.

Opinion of the Justices, 34 L. R. A. (N. S.), 604 (Mass.).

G., C. & S. F. R. Co. v. Ellis, 165 U. S., 150, 165.

**BRIEF AND ARGUMENT.**

*Can language act be sustained under the police power?*

The Iowa Supreme Court by a majority of the judges has held that the statute which the plaintiff in error is convicted of violating is constitutional because the acts therein prohibited are within the police power of the State.

The material portion of the statute (chap. 198, Acts 38th General Assembly, Session Laws of Iowa, 1919) reads:

"That the medium of instruction in all secular subjects taught in all of the schools public and private, within the State of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited; *provided, however,* that nothing herein shall prohibit the teaching and studying of foreign languages as such as a part of the regular school course in any such school, in all courses above the eighth grade."

Iowa has compulsory education law. The compulsory branches are reading, writing, spelling, arithmetic, grammar, geography, physiology, United States history, and American citizenship.

Iowa Code Supplement, 1913, section 2823-a

Chapter 406, Acts 38th General Assembly, section 1.

The language act and statutes here cited are printed at beginning of "Points and Authorities."

The plaintiff in error and his pupils are citizens of this country (Record, top page 6).

All of the said compulsory branches were taught by the plaintiff in error to his pupils by means of the same English text-books used in the public schools of that community, with English as the exclusive medium of instruction. The standard of excellence maintained by the school of the plaintiff in error in the compulsory branches was equivalent in all respects, and substantially the same as in the public schools of that community. This is admitted by paragraph numbered third of the stipulation of facts. The German reading, the teaching of which the Iowa Supreme Court held is prohibited by the language act, was taught as an additional subject, and the teaching thereof, under the admitted facts, did not interfere with the English education of the pupils in the compulsory branches.

We are an English-speaking nation. There is no room for contention that the welfare of the children and of the State and nation does not require that Americans should have an English education. We contend, however, that the welfare of neither is involved in our children and citizens acquiring knowledge of one or more foreign languages in addition to their English education. The utility, as well as the culture effect, of a knowledge of more than one language is too thoroughly recognized to require argument in its support. There is nothing inherently wrong in a child or an adult acquiring knowledge of a foreign language. Such knowledge is not poisonous *per se*—it is not un-American *per se*. On the other hand, the knowledge of one or more foreign languages has always been regarded as part of a liberal education, useful to the individual, to society, and to the State and nation. Certainly no modern language, such as German, French, Spanish, or Italian, can be condemned



as useless, or a knowledge thereof as harmful to an individual, old or young, or to the State or nation.

If the right to study and acquire knowledge of a foreign language is not a fundamental right of citizenship, and the right of a teacher to teach a foreign language to other citizens is not a fundamental right of property and liberty guaranteed by the 14th Amendment to the Federal Constitution, it would seem that a better reason for denying the right should be found to exist than has been stated by the Supreme Court of Iowa. True the constitutionality of similar statutes have been upheld by the courts of last resort of Nebraska and Ohio.

*Meyer v. State*, 187 N. W., 100 (Neb.).

*Pohl v. State*, 132 N. E., 20 (Ohio).

There is a strong dissenting opinion on the constitutional question in the Nebraska case, the reasoning of which we believe to be unanswerable.

There is quite a uniformity regarding the circumstances, which the three State supreme courts find justify the various language statutes under the police power.

In the instant case the Iowa court said:

"The advent of the great world war revealed a situation which must have appealed very strongly to the Legislature as justifying the enactment of this statute. Men called to the colors were found to be, in some instances, not sufficiently familiar with the English language to understand military commands or to read military orders. It was to meet this situation, to encourage the more complete assimilation of all foreigners into our American life, to expedite the full Americanization of all our citizens, that the Legislature deemed this statute for the best interests of the State. \* \* \*

Further, the Iowa Supreme Court by the majority said:

"With the wisdom of the act of the Legislature in passing the statute in question as a means of meeting this situation and seeking to remedy the same, we have no concern whatever. That question was wholly for the determination of the General Assembly."

Pursuing the same thought, the majority of the court further said:

"There is, as we view it, no inherent right, no 'privilege,' to teach German to children of tender years that cannot lawfully be denied by the Legislature when, in its judgment and discretion, the exercise of such right under existing conditions is inimical to the best interests of the State."

In the three excerpts printed above is found the gist of the decision. The evil to be remedied consisted in citizens and men called to the colors being ignorant of the English language. The remedy applied by the Legislature is denial of the right to teach foreign languages to children under the ninth grade. This remedy the Iowa Supreme Court holds is a matter "wholly for the determination" of the Legislature.

In *Lawton vs. Steele*, 152 U. S., 133; 38 L. Ed., 385, page 389, this court, speaking through Mr. Justice Brown, said:

"To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

The Iowa statute, as construed by the Supreme Court of this State, proceeds upon the theory that if the children of the State are prohibited from learning foreign languages in the schools, public and private, until after they have passed the eighth grade they will know English and will acquire an elementary English education. Knowledge of English is the ultimate end sought. Are the means prescribed in the statute "reasonably necessary for the accomplishment of the purpose?" One of the tests laid down by this honorable court in the Lawton case, *supra*, is "that the means are reasonably necessary for the accomplishment of the purpose." Many other authorities to this same effect will be cited in the course of argument. One does not learn English by refraining from learning German any more than he learns geography by refraining from learning arithmetic. The evil or mischief to be remedied is ignorance of English. The plain and only remedy would seem to be the study and use of English. The State should have, and manifestly does have, under its police power, the right to require the children of the State to acquire an elementary education in the English language. To that end the State may and had prescribed certain compulsory common-school branches to be taught. All these were by means of English text-books, through the exclusive medium of the English

language, and the results showed a standard of excellence equivalent to that of the public schools. Assuming two pupils of equal capacity, one educated in the public schools of the community, the other in the school taught by the plaintiff in error, the result would be that each would have identically the same English education, but the pupil educated in the school of the plaintiff in error, in addition thereto, would have acquired some reading knowledge of the German language. In what possible way is the State concerned in this further than it is interested in children making the most of their time in school? Manifestly that child has accomplished most who, in addition to acquiring the education offered in the public school, has acquired knowledge of an additional subject, and this is true even though that subject is a foreign language. We reiterate that all the State courts which have passed upon these foreign-language statutes have found the mischief or evil to consist in the ignorance of certain citizens of the English language, and not in the knowledge of a foreign language.

We contend that the State legislatures, doubtless as a result of crowd psychology engendered by the passions of the World War, have mistaken the remedy which is within the police power. Branches of study that are *per se* wrongful or harmful may be prohibited; but where the subject is proper and useful the act that may be prohibited is not the teaching of such proper and useful subject, but the omission to teach and give sufficient time to the English branches. In other words, a State cannot make it a crime to teach manual training, but it can make it a crime to fail to teach arithmetic; the State cannot make it a crime to teach domestic science, but it can make it a crime to fail to teach United

States history; and the State cannot make it a crime to teach a foreign language, but it can make it a crime to fail to teach the English language and reading in the English language.

The power of the State to require that pupils of private or parochial schools shall be given all the advantages of acquiring an education in English and all the advantages of learning Americanism and love of country that the public schools give is undoubted; but that private or parochial school which gives such advantages to its pupils and maintains the standard manifestly cannot be denied the right to teach additional subjects in no way harmful to the pupils, but, on the other hand, useful and proper.

We have no doubt of the State's right to make the common-school branches compulsory and to require that they be taught in English. The State's power likewise is sufficient to require that the teachers of private and parochial schools be qualified, and that they hold teachers' certificates which would entitle them to teach in the public schools. In fewer words, the State may require, as a condition of permitting children to attend a private or parochial school, that the school meets, as to teachers and branches taught and character of instruction, a standard equal to that of the public schools. But can the State go further and deny to the private school the right to teach additional subjects entirely proper and useful and suitable to the capacity of the pupils? Language study is particularly appropriate. Experience has shown that it should be commenced in the primary grades if it is expected that the pupil is to become proficient. Thousands upon thousands of college graduates will testify that, while they studied foreign languages for several years in

college and perhaps in high school, they began the study too late in life to acquire a speaking knowledge of the language. Manifestly no Legislature can constitutionally deny to children the right to learn to speak and read a foreign language at such age as will enable them easily and naturally to become proficient in the use of the language.

Chief Justice Evans, Justices Weaver and Preston concurring, wrote a strong dissenting opinion in the State court, in which it is contended that the German reading was taught by the plaintiff in error as a part of the religious instruction of the school, and that therefore, it was not prohibited by the Iowa statute. It seems to us that there is nothing to add to the argument of Chief Justice Evans upon the question of whether, under the circumstances of the case, the language was taught as a part of the religious instruction. If your honors hold, with the dissenting judges, that it was a part of the religious instruction, the question then arises whether the Fourteenth Amendment to the Federal Constitution inhibits the States from interfering with the religious freedom of citizens.

Whether the branch taught was a secular subject, as held by the majority of the Iowa Supreme Court, or a religious subject, as held by the dissenting judges, does not appear to be very material. Under the Constitution, one's civil liberty and rights are as sacred as are his religious liberties. In either case we are dealing with fundamental rights. The religious question, perhaps, serves to emphasize the fundamental character of the rights involved.

In passing upon the constitutional question involved before this court, the majority of the Supreme Court of Iowa, speaking through Mr. Justice Faville, said:

"Again, it is argued that the act in question is unconstitutional because it violates the Fourteenth Amendment to the Federal Constitution. This amendment has been the subject of such frequent discussion by our courts, Federal and State, that the decisions are like the sands of the sea for number.

"Is any right vouchsafed to the appellant by this amendment violated by this statute? There is, as we view it, no inherent right, no 'privilege' to teach German to children of tender years that cannot lawfully be denied by the Legislature when, in its judgment and discretion, the exercise of such right under existing conditions is inimical to the best interests of the State.

"This constitutional protection is enjoyed always subject to the police power of the State to regulate professions, trades, and occupations in the interest of the public welfare. The statutes regulating the practice of medicine, dentistry, and law are familiar examples of such lawful exercise of the power of the State regarding professions. See *Reetz v. Michigan*, 188 U. S., 505; *State v. Bair*, 112 Iowa, 466; *Gundling v. Chicago*, 177 U. S., 183; *Hunter v. Coal Co.*, *supra*; 12 *Corpus Juris*, 1121.

"As we have observed, a known evil existed; it was within the power of the Legislature to seek to remedy it by the enactment of this statute. The defendant has a right to engage in the profession of teaching, but in so doing he is subject to such legislative enactments as may be fairly and reasonably said to be for the public welfare. We think this statute was a proper and reasonable exercise of the police power of the State in attempting to prevent an existing evil which the Legislature regarded as inimical to the public welfare. Such being the case, the defendant has not been denied any privileges guaranteed him by the Constitution."



We believe that the Supreme Court of Iowa is wrong. The judgment of the Iowa Legislature that the teaching of German to children is inimical to the best interests of the State has no support in fact or reason. The mischief did not consist in children knowing German; the mischief consisted in children and citizens not knowing English—an essentially different thing. The plain remedy is to require that children and citizens acquire knowledge of English and an English education. This, too, is an essentially different thing from prohibiting them from acquiring a reading and speaking knowledge of a foreign language.

Given the opportunity, the children may not only acquire knowledge of English and an English education, but at the same time knowledge of a foreign language.

In *Berea College v. Commonwealth of Kentucky*, 211 U.S., 45; 53 L. Ed., 81, a statute of Kentucky prohibited the teaching of white and colored pupils at the same time in any public or private school of the State, regardless of whether the school was operated by individuals, associations, or corporations.

The plaintiff corporation was indicted and convicted, it being alleged and proved that it had violated the statute by teaching white and colored children in its college at the same time. The Supreme Court of Kentucky sustained the conviction on two grounds, (1) that the right to teach white and negro children in a private school at the same time was not a property right, and (2) that, as plaintiff was a corporation, the conviction should be upheld because plaintiff could exercise only such corporate powers as the State conferred upon it, and that the right to thus teach white and colored children at the same time had not been conferred upon it by law.

This court affirmed the case on the ground that a corporation had no natural right to teach, and that its powers in that respect might be limited by statute. The court further held that whether an individual could thus be prohibited from teaching white and colored children at the same time was not involved, in that the provision of law prohibiting corporations might be held valid although the provisions prohibiting individuals might be unconstitutional.

Mr. Justice Harlan, Mr. Justice Day concurring, dissented on the ground that the statute was not susceptible of being divided into constitutional and unconstitutional parts, and that it must stand or fall as a whole. Therefore they considered the case as though an individual was involved instead of a corporation. The dissenting opinion is so strongly in point with the instant case that we quote from it. We do this the more readily in that apparently had an individual teacher been involved instead of a corporation the court, as a whole, would have concurred in the parts of the dissenting opinion which we quote. (See *Buchanan v. Warley*, 211 U. S., 45, where, on page 79, this court said that the college case was affirmed "solely upon the reserved authority of the Legislature of Kentucky to alter, amend, or repeal charters of its own corporations.")

Beginning page 67 of the Berea College case (L. Ed., page 90), the dissenting justices said:

"The capacity to impart instruction to others is given by the Almighty for beneficent purposes; and its use may not be forbidden or interfered with by government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction,

harmless in itself or beneficial to those who receive it, is a substantial right of property—especially, where the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile State action by the Constitution of the United States. This court has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways.' *Allgeyer v. Louisiana*, 165 U. S., 578; 41 L. Ed., 832; 17 Sup. Ct. Rep., 427; *Adair v. United States*, 208 U. S., 161, 173; 52 L. Ed., 436, 442; 28 Sup. Ct. Rep., 277. If pupils, of whatever race—certainly, if they be citizens—choose, with the consent of their parents, or voluntarily, to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether Federal or State, can legally forbid their coming together, or being together temporarily, for such an innocent purpose. If the Commonwealth of Kentucky can make it a crime to teach white and colored children together at the same time, in a private institution of learning, it is difficult to perceive why it may not forbid the assembling of white and colored children in the same Sabbath school, for the purpose of being instructed in the Word of God, although such teaching may be done under the authority of the church to which the school is attached as well as with the consent of the parents of the children. So, if the State court be right, white and colored children may even be forbidden to sit together in a house of worship or at a communion table in the same Christian church. In the cases supposed there would be the same association of white and colored persons as would

occur when pupils of the two races sit together in a private institution of learning for the purpose of receiving instruction in purely secular matters. Will it be said that the cases supposed and the case herein in hand are different, in that no government, in this country, can lay unholy hands on the religious faith of the people? The answer to this suggestion is that, in the eye of the law, the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law. Again, if the views of the highest court of Kentucky be sound, that Commonwealth may, without infringing the Constitution of the United States, forbid the association in the same private school of pupils of the Anglo-Saxon and Latin races respectively, or pupils of the Christian and Jewish faiths, respectively.<sup>12</sup> Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes, simply because of their respective races? Further, if the lower court be right, then a State may make it a crime for white and colored persons to frequent the same market places at the same time, or appear in an assemblage of citizens convened to consider questions of public or political nature, in which all citizens, without regard to race, are equally interested. Many other illustrations might be given to show the mischievous, not to say cruel, character of the statute in question, and how inconsistent such legislation is with the great principle of the equality of citizens before the law."

While the foregoing is from a dissenting opinion, as above stated, we believe that the rule of law must be as is stated at the beginning of the quotation.

As there said, it manifestly must be true that the use of one's capacity to impart instruction to others "may not be forbidden or interfered with by government, certainly not, unless such instruction in its nature is harmful to the public morals or imperils the public safety." It likewise must be true that the "right to impart instruction harmless in itself or beneficial to those who receive it, is a substantial right of property \* \* \* but even if such right be not strictly a property right, it is beyond question a part of one's liberty as guaranteed against hostile State action by the Constitution of the United States. \* \* \*"

Manifestly this court cannot approve the finding of the Iowa Legislature that the instruction in the German language given by the plaintiff in error to his pupils was "in its nature harmful to the public morals or imperils the public safety." The right of the plaintiff in error to give such instruction, therefore, was a property right, or if not strictly a property right it is a part of his liberty guaranteed against hostile State action by the Fourteenth Amendment to the Federal Constitution.

The above also bears upon the religious question in event that the court concurs with the minority of the Iowa court. Mr. Justice Harlan certainly treated the Fourteenth Amendment as guaranteeing religious liberty. He said:

"Will it be said that the cases supposed and the case herein in hand are different in that no government, in this country, can lay unholy hands on the religious faith of the people? The answer to this

suggestion is that, in the eye of the law, the right to enjoy one's religious belief, unmolested by any human power, is no more sacred or more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either would be an infringement of the liberty inherent in the freedom secured by the fundamental law."

We do not contend that a State may not prohibit any subject being taught in its public schools. Doubtless it might forbid the teaching of United States history in its public schools. The State's power, however, over private schools is a different matter.

The power which the State may exercise over private schools is well stated in a single paragraph.

24 R. C. L., page 562, section 5, reads:

"CONTROL OVER PRIVATE SCHOOLS.—While, as already stated, the power of the Legislature over public schools is complete, there is no such power in regard to private schools, nor in fact any power at all in so far as the educational features are concerned. The power of the Legislature to regulate or prohibit private schools is subject to the same limitations as the power to regulate private property rights in general. The Legislature, under the police power, may regulate education in many respects in private schools. But the exercise of such police power must not be arbitrary, and must be limited to the preservation of the public safety, the public health, or the public morals. The Legislature has no power to prohibit or authorize the voters to prohibit the establishment of a private educational institution, unless it be inimical to the public health, public safety or public morals. If the private institution be a cor-

poration any act attempting to regulate it by amending its charter, where the power of amendment was not reserved, comes squarely under the decision of the Dartmouth College case."

As a part of a compulsory education system the State may prohibit children of compulsory school age from attending schools not offering the compulsory course, but, manifestly, it cannot prohibit the school doing compulsory school work from teaching additional subjects not in any way harmful to the State or the children, and in nowise imperiling the public welfare or public morals.

The Nebraska language act is quite similar to the Iowa act. In Nebraska District E. L. S. v. McKelvie, 104 Nebraska, 93; 175 N. W., 531, the Nebraska law was construed so as to permit the teaching of a foreign language as an additional subject where the teaching thereof did not interfere with the instruction in the compulsory branches in English. That court said:

"Furthermore, there is nothing in the Act to prevent parents, teachers or pastors from conveying religious or moral instruction in the language of the parents, or in any other language, or in teaching any other branch of learning or accomplishment, provided that such instruction is given at such time that it will not interfere with the required studies."

The Nebraska Supreme Court further said:

"If the law means that parents can teach a foreign language, or private tutors employed by men of means may do so, but that poorer men may not employ teachers to give such instruction in a class or school, it would be an invasion of personal liberty,



discriminative and void, there being no reasonable basis of classification, but if such instruction can be given in addition to the regular course, and not so as to interfere with it, then equality and uniformity results, and no one can complain."

The Nebraska court, however, in *Meyer v. State*, 187 N. W., 100, has modified or overruled the part of the decision quoted above. In the *McKelvie* case, *supra*, the opinion is by Justice Letton, and in the *Meyer* case Justice Letton, Chief Justice Morrissey concurring, dissent.

As the dissent is bottomed upon the Federal Constitution and the argument appears to us to be sound, we quote therefrom, as follows:

Justice Letton said:

"The matter is of grave importance, since it involves the question as to the extent that a Legislature may infringe upon the fundamental rights and liberty of a citizen protected by the State and Federal constitutions. I am unable to agree with the doctrine that the Legislature may arbitrarily, through the exercise of the police power, interfere with the fundamental right of every American parent to control, in a degree not harmful to the State, the education of his child, and to teach it, in association with other children, any science or art, or any language which contributes to a larger life, or to a higher and broader culture.

"Educators agree that the period of early childhood is the time that the ability to speak or understand a foreign, or a classic, language is the most easily acquired. Every parent has the fundamental right, after he has complied with all proper requirements by the State as to education, to give his child

such further education in proper subjects as he desires and can afford. As was pointed out in Nebraska District, E. L. S., *v. McKelvie*, *supra*, the legitimate object of the statute has been accomplished when the basic and fundamental education of every child in the State has been acquired in the English language, instead of in the language of a foreign country.

"The State has the right to manage and control in all particulars schools maintained by taxation; to place other schools under State supervision and to require the same general standards; but it has no right to prevent parents from bestowing upon their children a full measure of education in addition to the State required branches. Has it the right to prevent the study of music, of drawing, of handiwork, in classes or private schools, under the guise of police power? If not, it has no power to prevent the study of French, Spanish, Italian, or any other foreign or classic language, unless such study interferes with the education in the language of our country, prescribed by the statute.

"In *State v. Ferguson*, 95 Neb., 63, 73; 144 N. W., 1039, 1043; 50 L. R. A. (N. S.), 266, it is said in the opinion by Judge Fawcett:

"The public school is one of the main bulwarks of our nation, and we would not knowingly do anything to undermine it; but we should be careful to avoid permitting our love for this noble institution to cause us to regard it as 'all in all' and destroy both the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children.'

We have said that the Legislature cannot, under the guise of police regulation, arbitrarily invade personal rights, and that—

"The test when such regulations are \* \* \* in question is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained.' *Smiley v. MacDonald*, 42 Neb., 5; 60 N. W., 355, 27 L. R. A., 540; 47 Am. St. Rep., 684; *In re Anderson*, 69 Neb., 686; 96 N. W., 149; 5 Ann. Cas., 421; *Union P. R. Co. v. State*, 88 Neb., 247; 129 N. W., 290; *State v. Whithnell*, 91 Neb., 101; 135 N. W., 376, 40 L. R. A. (N. S.), 898.

Since the restriction cannot be supported on the ground of 'public welfare,' it is now sought to sustain it on the ground of 'public health.' The supposition that this restriction in the statute might have been inserted in the interest of the health of the child is evidently an after-thought. It was not suggested by counsel either in the briefs or at the hearing. It is patent, obvious, and a matter of common knowledge that this restriction was the result of crowd psychology; that it is a product of the passions engendered by the World War, which had not had time to cool. The idea that the Legislature had in mind the protection of the child from overstudy, or lack of recreation, seems far-fetched, when it is realized that outside of city districts only 12 weeks' school attendance in a year is required by the law, and that in city districts the hours of study for young children are carefully limited by the boards of education. The statute was construed and upheld (except as to the restriction now reinstated by the majority opinion) in the opinion in the *McKelvie* case, written by me. It was there held (with that exception) to be a proper and salutary measure, upon substantially the same grounds as are now suggested in the majority opinion. The doctrine of *stare decisis* should be applied, and the former opinion adhered to."

Thus far no suggestion has been made that the Iowa language statute was passed as a public health measure. The Iowa compulsory school year is 24 weeks. (See Compulsory Education Law, printed near beginning of Points and Authorities.) We believe that the reasoning of Mr. Justice Letton, *supra*, is unanswerable should the defendant in error try to uphold the law as a public-health measure.

The rule when and how the police power may be exercised by the States is well stated in 12 *Corpus Juris*, page 929, section 441, as follows:

"In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare, that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable, and appropriate manner tend toward the accomplishment of the object for which the power is exercised."

Authorities sustaining the above rule are overwhelming. Among the many that might be cited, we cite the following:

Lawton *v.* Steele, *supra*.

Buchanan *v.* Warley, 245 U. S., 60, 81; 62 L. Ed., 149, 163.

Lochner *v.* New York, 198 U. S., 45, 56; 49 L. Ed., 937, 941.

Truax *v.* Raich, 239 U. S., 33, 41; 60 L. Ed., 131, 135.

Yee Gee v. City, 235 Federal, 757, 763, and 764.

People v. Steele, 83 N. E., 236 (Ill.); 14 L. R. A. (N. S.), 361, 365.

People v. Weiner, L. R. A., 1916 C, pages 775, 778 (Ill.).

The above authorities were cited in the petition for rehearing and liberal quotations made therefrom, which appear on pages 42-45, inclusive, of the printed transcript of record. It is unnecessary, therefore, to print the quotations here.

Before the constitutionality of a statute can be sustained under the police power the courts must be able to see (1) the evil or mischief to be remedied, which evil or mischief must affect the general welfare, safety, morals, or health of the people, (2) that the provisions of the statute have some clear, real, and substantial connection with the purpose of the enactment, and (3) that the statute in plain and appropriate manner tends toward remedying the evil.

The authorities further hold that where regulation will accomplish the end prohibition may not be resorted to.

For example, the Illinois court in *People v. Weiner, supra*, said:

"It is eminently proper to require that material be free from germs of contagion and infection before being used in mattresses, comforters or quilts, whether the material be second-hand or new; but the possible danger to health or safety does not justify the absolute prohibition of a useful industry or practice where the danger can be dealt with by regulation."

The industry was the manufacture of mattresses, etc., from second-hand material; this the statute attempted to prohibit.

The evil might have been remedied by requiring such material to be properly sterilized.

This court, in *Buchanan v. Warley*, 245 U. S., 60, 81; 62 L. Ed., 149, 163, used this pertinent language:

"That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control and to which it must give a measure of consideration may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges."

In that case this court pointed out certain regulatory measures that it had upheld, such as separate schools and separate cars for the white and colored races, but when it had before it a statute prohibiting a colored person from moving into a block the majority of the residents of which were white it declared the law void.

That there should be a measure of consideration by State legislatures sufficient to insure that children educated in America shall know English and receive at least an elementary English education, as well as instruction in patriotism, is manifest to all. Proper regulation will secure this without prohibiting children from learning a foreign language in private schools.

As heretofore suggested, we believe that not only are civil rights invaded by the statute, but, under the circumstances shown in this case, the religious liberties of the plaintiff in error, his pupils, and their parents are also infringed.

### **Religious Phase.**

The agreed facts show that German was taught for a religious purpose, and it should be held to be a part of the religious instruction given by the school.

Authorities supporting the contention that religious liberties are involved, are:

*Church of the Holy Trinity v. United States*, 143 U. S., 457; 36 L. Ed., 226.

*State v. Amana Society*, 132 Iowa, 304.

The dissenting opinion in the instant case contains quotations from the authorities above cited, and it is therefore, unnecessary to comment on them.

### Classification.

The classification in the Iowa language act raises a further constitutional question. The prohibition is limited to elementary schools. There is no inhibition preventing the rich and the well-to-do from having their children taught a foreign language at home or in classes outside of the school, while the poor man sending his children to this school can not have his children taught a foreign language in the only place which his means will enable him to employ.

There is no distinction as to the subject-matter. It is not the subject-matter, but the language, that falls under the ban of the statute. No distinction is made between good schools and bad schools, or between good teachers and bad teachers. The languages of our associates in the World War are equally condemned with the language of our enemies.

A statute containing such inconsistencies and working such results passes the limit of proper police regulation.

*Neb. District E. L. S. v. McKelvie*, 175 N. W., 530, 535.

*Adams v. Tanner*, 244 U. S., 590, 596; 61 L. Ed., 1336, 1343.

*Opinion of the Justice*, 34 L. R. A. (N. S.), 604, 607 (Mass.).



In *Adams v. Tanner*, *supra*, this court declared a statute of the State of Washington void for the reason that there was no attempt to discriminate between good employment agencies and bad employment agencies. The statute in that case simply prohibited any agency from charging or receiving any fees from employees for finding them employment.

In the opinion of the justices, *supra*, the proposed statute would have prohibited women under the age of 21 years from entering or being served with food or drink in a hotel or restaurant conducted by Chinese. The court recognized that there might be evils for young women to enter or to be served in certain restaurants or hotels. The holding was that bad restaurants and hotels might be kept by Americans or persons of other nationality as well as by Chinese, and that the classification was arbitrary and unreasonable.

The Massachusetts court quoted from Mr. Justice Brewer as follows:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

*G., C. & S. F. R. Co. v. Ellis*, 165 U. S., 150, 165.

If the children who were taught German by the plaintiff in error might have been lawfully taught by their parents

or by tutors in the home or in classes outside of school, it would seem that the classification has no proper basis.

Although the holding in the McKelvie case has been overruled by the majority of the Supreme Court of Nebraska, we think that the original decision in the respects under consideration clearly states the rule required by the Federal Constitution as follows:

"If the law means that parents can teach a foreign language, or private tutors employed by men of means may do so, but that poorer men may not employ teachers to give such instruction in a class or school, it would be an invasion of personal liberty, discriminative and void, there being no reasonable basis of classification."

The Iowa act does just what the above rule condemns.

### Conclusion.

The case is an important one. The courts of last resort of Iowa, Nebraska, and Ohio have upheld these statutes. They have not only upheld them, but they have given them a very arbitrary and severe construction. Acts admittedly innocent are held to be criminal, contrary to the rule that innocent acts are not within the spirit of the law although within the letter. Fundamental rights, as well as the liberty and property rights of the plaintiff in error, are involved. The decision by your honors in this case will be one of the precedents defining the boundary between the rights and liberties of the people, on the one hand, and the power of the States on the other. We believe that those rights and lib-

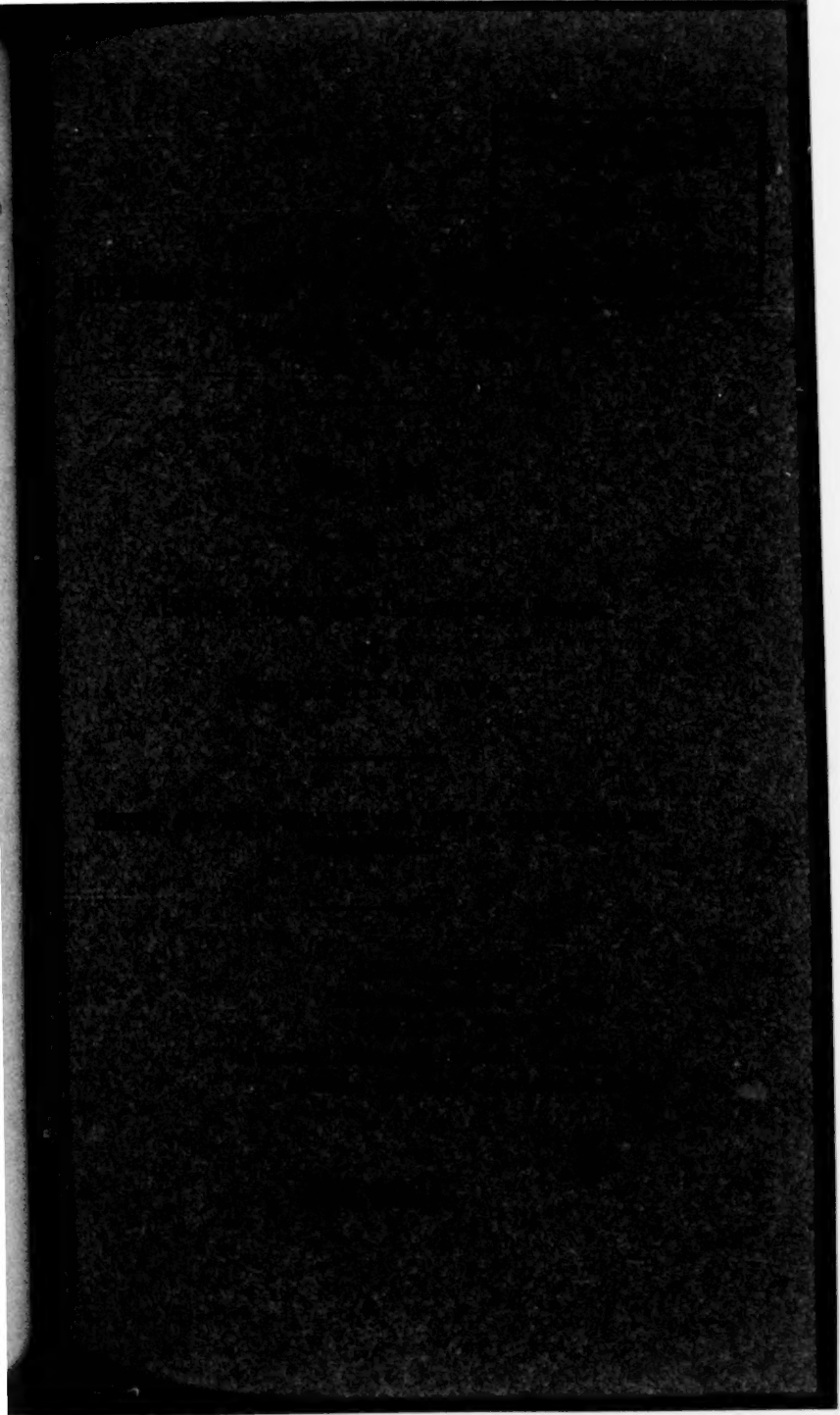
erties have been invaded and that, therefore, the statute should be declared void.

Respectfully submitted,

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FRANK E. FARWELL,  
BENJAMIN F. SWISHER,  
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*Of Counsel.*

(6917)



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     Article XIV, Amendments to Constitution of the United States.  
     Section 1, Article I, of the Constitution of Iowa.
2. Statute to be construed :  
     Iowa Language Act, chapter 198, Acts of the Thirty-eighth General Assembly (Session Laws of Iowa, 1919).

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IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1922.

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**No. 134.**

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AUGUST BARTELS, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF IOWA.

---

**BRIEF AND ARGUMENT OF THE STATE OF IOWA,  
DEFENDANT IN ERROR.**

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**Statement.**

The plaintiff in error was engaged in teaching in a parochial school in Bremer County, Iowa. There were no classes in his school above the eighth grade. The school year of 36 weeks was longer than the public school year required by statute, but it was not longer than is usually required by the boards of directors under authority given them by statute to prescribe for the school year. This school purported to take the place of a public school. As a regular

part of the school work reading was taught in the German language in the ordinary way, using the ordinary secular text-books, which correspond to the books that are usually used in teaching English reading in the public schools.

Chapter 198 of the Acts of the Thirty-eighth General Assembly of Iowa prohibits instruction in the secular subjects in all of the schools, public or private, within the State of Iowa in any language other than English. Plaintiff in error was arrested for violation of this law; was convicted in the Justice Court of Bremer County, which conviction was affirmed by the District Court of that county and by the Supreme Court of the State of Iowa.

### **Propositions and Points.**

#### **I.**

#### *Constitutional Question.*

Plaintiff in error cannot insist that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case he presents the effect of applying the statute is to deprive him of his property without due process of law.

Davidson v. New Orleans, 96 U. S., 97, 104.

New York and North Eastern R. Co. v. Town of Bristol, 151 U. S., 566, 570.

The constitutionality of the statute cannot be assailed without showing that the party questioning it has been de-

prived of property or liberty in some arbitrary way; because some other person might be thus affected, he is not authorized to ask the court to invalidate a law on questions of constitutionality which do not directly affect him.

The constitutionality of acts like the one in question has been upheld in the following cases:

Nebraska District E. L. S. *v.* McKelvey, 104 Nebr., 93; 175 N. W., 531.

Pohl *v.* State (Ohio), 132 N. E., 20.

State of Iowa *v.* August Bartels, 191 Ia., 1074.

Castello *v.* McConnico, 168 U. S., 680.

Tyler *v.* Judges, 179 U. S., 410.

Strouse *v.* Foxworth, 231 U. S., 162.

## II.

### *Religious Freedom.*

The language of the statute does not violate article I, section 3, of the State Constitution prohibiting the free exercise of religion. The defendant is not being prosecuted for giving religious instruction in a foreign language.

Commonwealth *v.* Herr, 229 Pa. St., 132.

## III.

### *Classification.*

When the law operates equally upon all, when the rule of conduct is uniform throughout the State, affecting alike the legislator, his family, his neighbors and friends, the



presumption lying at the foundation of representative government is that the legislator will act wisely and in the interest of all of the people. Such legislation is not open to the objection that it is class legislation.

*Viermaster v. White*, 179 N. Y., 235; 70 L. R. A., 796.

*Patson v. Penn*, 232 U. S., 138.

*Northwestern Laundry v. City of Des Moines*, 239 U. S., 486.

*Lindsley v. Natural Carbonic Gas Co.*, 220 U. S., 61.

*Booth v. Illinois*, 184 U. S., 425, 431.

*Adams v. Milwaukee*, 228 U. S., 572.

*State v. Fairmont Creamery Co.*, 153 Iowa, 702.

*Bopp v. Clark*, 165 Iowa, 697.

*Hunter v. Coal Co.*, 175 Iowa, 245.

#### IV.

##### *Police Power.*

In determining the reasonableness of a police regulation the Legislature is at liberty to act with reference to established usages, customs, and conditions of the people and with a view to the promotion of their comfort and the preservation of the public peace and good order.

*Plessy v. Ferguson*, 163 U. S., 550.

*Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S., 556, 559.

It will be presumed that the Legislature in passing this statute was familiar with existing conditions, and that no

general laws are ever passed either through want of information on the part of the Legislature or because it was misled by false representations of innocent parties.

12 C. J., 799.

Laurel Hill Cemetery Asso. *v.* San Francisco, 216 U. S., 358, 363.

Courts do not sit in judgment upon the wisdom of legislative enactments.

Louisville, etc., *R. Co. v. Kentucky*, 183 U. S., 512.  
 Lottery Cases, 188 U. S., 363.

*McCrary v. U. S.*, 195 U. S., 53.

*Ex parte Bryce (Nev.)*, 75 Pac., 1.

## ARGUMENT.

### I.

The language act providing that the medium of instruction in all secular subjects taught in all of the schools, public and private, within the State of Iowa shall be the English language, prohibiting the use of any other language than English in secular subjects in said schools below the eighth grade, will be found copied at length on pages 11 and 12 of the brief of the plaintiff in error in this cause.

The plaintiff in error, having been convicted of a violation of the terms of section I of said act, insists that he is being deprived of liberty or property, and that certain guaranteed rights are being denied him. That defendant has been deprived of any rights guaranteed him by the Constitution does not appear at any place in the record. It does not appear that the defendant has lost his position or

is prevented from pursuing his calling as a teacher by the operation of this statute. He is prevented from teaching German below the eighth grade, and a fine has been imposed upon him for a violation of this provision of the statute. He cannot raise questions here that pertain only to the liberties of the pupils or of their parents. Whether these pupils are denied arbitrarily certain rights, if such is the case, is not before the court at this time. They and not the teacher are supposed to be the recipients of the benefits of receiving instruction in German.

Conceivably a case might be brought which would fairly present the question whether the rights and liberties of these children are abridged by this statute in an arbitrary way. Much of counsel's argument is devoted to this question; thus it is claimed that the teaching of German in this school is justified because it is to be used for the purpose of enabling the children to read the Bible and receive religious instruction in the German language; but if that is true it is the children who are deprived of privileges they have heretofore enjoyed and not the teacher. The following language found in the case of *Davidson v. New Orleans*, 96 United States, 97, 104, is, we believe, an answer to the argument of plaintiff in error on this proposition:

"The Fourteenth Amendment cannot be availed of as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the State court of the justice of the decision against him and of the merits of the legislation on which such a decision may be founded."

We believe that a further discussion of this point would be burdensome.

In deciding whether defendant is being arbitrarily deprived of his rights it is immaterial what was the purpose of the instruction. If the intention had been to have the children learn German, so that they might be better fitted for commercial pursuits, the question in this case would be the same. We think the statute is constitutional and that it could not be successfully attacked by any interested person. Following the lead of defendant, we shall discuss it generally.

## II.

### *Religious Phase.*

Plaintiff in error was engaged in teaching German in his school as a secular subject, and while that subject was reading, yet every one who has had a course in German reading knows that in order to read one must have instruction in German grammar. There is nothing about the teaching of the language that remotely suggests religion. It is purely a secular subject, and secular, as used in the law, has its ordinary meaning, to wit, that which is not religious. The readers used in the class-room are admitted to be similar to the readers used in teaching English in our public schools. It is not pretended that the great Bible truths are dealt with, or that things religious are referred to in the readers themselves, except perhaps incidentally as a part of historical and literary events. The pupils of the plaintiff in error may never receive religious instruction in German or any other language so far as his school is concerned. He does not contend that the subject, for the teaching of which he was arrested, is religious in character, but rather that it was in-

tended to equip the pupils for religious worship outside of his school. The statute under consideration does not in any way strike at the exercise of religious freedom or pretend to prevent religious worship. There is nothing in the law preventing the plaintiff in error from giving his pupils religious instruction in English or in German provided they get their knowledge of that language in some other way than in his school. We are not concerned in this action in trying to determine in what way they might acquire the use of German, but undoubtedly their parents could teach it to them. The test of this statute is not being made from the standpoint of the children or of their parents; they are not represented, and much of the able argument of plaintiff in error is wide of the mark, because it is assumed that he may raise all of the questions that might be raised by the parents or pupils.

It is not asserted that plaintiff in error is being deprived of his right to worship according to the dictates of his own conscience, or that his freedom of worship is being interfered with in any way. He does assert that he believes that his religious liberties are infringed by the legislation in question and refers to the dissenting opinion written by Mr. Chief Justice Evans, of the Iowa Supreme Court, in this case. He has so little confidence in this assertion, however, that he does not argue the point at length, and we will therefore refrain from further comment thereon.

### III.

#### *Classification.*

We may as well eliminate the claim that the language act denied the plaintiff in error the equal protection of the law.

There is no question of permitting some and denying others the right to teach a foreign language. It applies to all schools, public, private, and parochial, and consequently to all teachers that may be employed in those schools. Compliance with the law requiring certain subjects to be taught is all that can be demanded of the parochial school. It is not contended but that, as applied to the public school, the act means exactly what it says, viz., "that all instruction below the eighth grade in secular subjects shall be in English." Suppose the public school that operates in the district where this action arose had done the very thing that the defendant admits he was doing. Plaintiff in error admits that with reference to such school the legislation in question is constitutional. Is there any reason advanced by counsel, or that could be advanced by any one, for holding that one interpretation is permissible where the instruction is in a private or parochial school and a different interpretation where the same instruction is given in a public school. The words "public, private, and parochial" are used in the act in the same phrase and all modify the word "schools." If private and parochial schools are permitted to give instruction in a foreign language, so that the children of foreign parentage may be given religious instruction in the language of their elders, then we must accord the same privilege to the public school.

It seems to us that the argument of plaintiff in error on this point turns against him when analyzed, and that if an interpretation were placed upon the act in question permitting the teaching of German by plaintiff in error in his school and denying that right in other schools the legislation might be subject to the criticism which plaintiff in error attempts to make under this assignment in his brief.

## IV.

*Police Power.*

The law has a very tender regard for the rights of children and recognizes their helplessness, and under the police power many statutes have been enacted for their protection. While these statutes are ordinarily prompted by a consideration of the morals or the health of the child, yet many of them have to do solely with the education and proper rearing of the child. All of these statutes infringe somewhat upon the rights of parents, and they have been often attacked as infringing upon the rights of the children themselves. Under our form of government the very safety of the State depends upon the proper education of its citizens, so that the public interest and welfare and even the sovereignty of the State is directly affected by this sort of legislation. The statute under consideration can be defended upon the latter ground. The presumption is that the Legislature in enacting this statute was familiar with existing conditions. As such conditions warranted the conclusion that children were being educated away from the path of loyalty, then it was the undoubted right of the Legislature to prohibit the teaching of those things which tended to alienate the affections of the children and fix them upon some foreign power or upon institutions which have no place in a democracy.

At the time of the enactment of this legislation our whole country was discovered to be infested with German spies; people of German birth, whether citizens of this country or not, were openly sympathetic with the nation that violated its treaties with friendly powers and that was engaged in

ruthless warfare against unoffending people. Our own flag was insulted, our people murdered, and our protests scorned. There were large numbers of people in almost every community who opposed our entry into the war, belittled our efforts to prepare, opposed the draft, resisted the great drives for funds to prosecute the war, rejoiced at our failures and the failures of our allies, all the while circulating a propaganda that was more deadly than German bullets. It is true that in Iowa the situation was less acute than in many other places, because our German and Austrian population was more scattered, but there were anxious times in nearly every county of the State. In spite of the fact that there was an overwhelming sentiment in favor of our entry into the war and of its vigorous prosecution after we had entered the great struggle, these people, many of whom had renounced their allegiance to the fatherland and sworn to support the Government of the United States, were disloyal openly where they dared take such a course and secretly where they did not.

Because these people retained the language of their birth-place this disloyalty was difficult to detect. There was a patriotic demand that English be used on all occasions, and then it was that the disloyal threw out the smoked screen of religion. Religious freedom is one of the corner-stones of constitutional structure, but it ought not to be tolerated as a subterfuge to encourage the building of social centers all over the country which are unAmerican and which tend to perpetuate manners, customs, and modes of thought that are not in harmony with our political institutions.

As asserted by plaintiff in error in his argument, the most impressive age of a child is when he is in attendance upon



the lower grades in school. It is then that under the guidance of preparing him for the study of the Bible and religious worship with his parents his instructors can deeply impress upon his mind and heart the greatness of the fatherland and the divine right of Kaisers. Every one familiar with this subject knows the character of stories that are prepared for the translation of the student of the German language. As has been said, they have little or nothing to do with the Bible and are far from religious in character. If a student can read and understand the German Bible, surely he can read and understand secular subjects in that language. If he can converse about religious matters, he can converse about secular matters in the same language; if he can write all religious subjects in the German script, he can use it to fermenting distrust of American institutions and policies. These things have been done and are being done today and they will continue to be done. If we are powerless to protect the sovereignty of the State and of the Nation against foreign propaganda spread about under our very noses in a language we do not understand, then it is high time we were finding it out.

We say to vendors of food, you must not mix poison with your wares. We protect the bodies of our people in this way. Are we powerless to protect them against mental poison? May we not by appropriate legislation strike at the very root of the evil? Can we say to the foreigner or to those of foreign extraction, you may use your language for religious purposes, but for no other? Could the Legislature have passed a statute permitting the learning of a foreign language to be used solely for religious purposes? We presume so, but it would have been impossible to enforce it. The

only sort of law that could be effective is some such law as was adopted.

The only way in which the child may attain and retain proficiency in the use of a foreign language is to use it regularly. Such use if confined to purely religious subjects would be impractical, and plaintiff in error does not contend otherwise; on the contrary, he speaks of the cultural effect of learning the additional language and of the readiness with which children may learn to use two or more languages, showing that he knows that such languages are to be the medium of expression in all subjects. He assumes that the child will acquire a thorough knowledge of English if the compulsory branches are taught in English, but it would be easy to evade this requirement and place the chief emphasis on the learning of a foreign tongue. In other words, if a community wants to evade the law it would be impossible to prevent them from so doing if we permit the use of a foreign language in teaching secular branches.

The Legislature of Iowa knew the facts as they existed in this State at the time of the passage of the foreign-language act. The act was designed in the interest of the safety and welfare of the community. The Supreme Court of Nebraska had already upheld the constitutionality of a similar act passed by the Legislature of that State.

Nebraska District E. L. S. *v.* McKelvey, 104 Nebr., 93; 175 N. W., 531.

Since the decision of this case in the Supreme Court of Iowa the Supreme Court of Ohio has upheld similar legislation in that State.

*Pohl v. State* (Ohio), 132 N. E., 20.

In this connection the language of this court, speaking through Mr. Justice Holmes in the case of *Laurel Hill Cemetery Association v. San Francisco*, 216 U. S., 358, 363, is pertinent:

"If every member of this bench clearly agreed that burying grounds were centers of safety and thought the board of supervisors and the Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinions still may be divided, and if on the hypothesis that the danger is real the ordinance would be valid, we should not overthrow it because of our adherence to the other belief \* \* \*. The plaintiff must wait until there is a change of practice, or at least an established consensus of opinion, before it can expect this court to overthrow the rules that law-makers and the court of its own State upheld."

### Conclusion.

This case is of considerable importance. In the judgment of the Legislature of the State of Iowa conditions existed which not only warranted but demanded the legislation in question, and recent history has demonstrated that their judgment has support in fact. Opinions may differ as to the wisdom of the Legislature, but, as was said by this court in the case of *Louisville and Nashville Railroad Company v. Kentucky*, 183 U. S., 503, 512, speaking through Mr. Justice Shiras:

"It is scarcely necessary to say that courts do not sit in judgment on the wisdom of legislative or constitutional enactments. This is a general principle; but it is especially true of Federal courts when they are asked to interpose in a controversy between a State and its citizens."

None of the fundamental rights guaranteed to plaintiff in error by the Constitution have been violated. He has been deprived of neither liberty nor property. His religious freedom has not been denied, and he may still worship God according to the dictates of his own conscience. If, as his argument would indicate, he seeks in this cause the protection of the rights of others, may we answer him in the language of this court, speaking through Mr. Justice White:

"The plaintiff in error has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case he presents the effect of applying the statute is to deprive him of his property without due process of law."

We submit that there is no constitutional question presented demanding the attention of this court, and that this case should be dismissed or the decision of the Supreme Court of Iowa affirmed.

Respectfully submitted,

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BRUCE J. FLICK,  
*Assistant Attorney General of Iowa.*

I hereby certify that the cost of printing the foregoing brief and argument is \$—.

BRUCE J. FLICK,  
*Assistant Attorney General.*

*Bruce J. Flick*

*Counsel*

(7117)

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922

No. 181

H. H. BOHNING, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO.

---

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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FILED OCTOBER 1, 1921.

(28,516)

(28,516)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 561.

H. H. BOHNING, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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Supreme Court of Ohio.

No. 16493.

H. H. BOHNING, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

Error to the Court of Appeals, Cuyahoga County, Ohio.

RECORD.

Harry F. Wittenbrink,  
Geo. B. Okey,  
Timothy S. Hogan,  
Attorneys for Plaintiff in Error.

John G. Price,  
Attorney-General,  
Attorney for Defendant in Error.

Filed Jan. 21, 1920. Supreme Court of Ohio. W. C. Lawrence,  
Clerk.

Supreme Court of Ohio.

No. 16493.

H. H. BOHNING, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Petition in Error.*

[Filed January 8, 1920.]

Plaintiff in error says that on the 8th day of September, 1919, by the judgment of the Mayor's Police Court of the village of Garfield Heights, county of Cuyahoga and State of Ohio, he was found guilty by said court, and fined \$25.00 and costs, for a violation of the act of the general assembly of the State of Ohio, entitled "An act to supplement section 7762 of the General Code, by the addition of supplemental sections 7762-1, 7762-2, 7762-3 and 7762-4, and to repeal section 7729, concerning elementary, private and parochial schools and providing that instruction shall be in the English language," passed May 8, 1919, approved June 5, 1919; that a demurrer was interposed to the affidavit filed



against him in said court, which was overruled; that motions made by him in said court in arrest of judgment and for a new trial, were overruled; that error was prosecuted in the Common Pleas Court of Cuyahoga county, Ohio, where the judgment of said Mayor's Police Court was affirmed, and the petition in error was dismissed; that error was prosecuted in the Court of Appeals of Cuyahoga county, Ohio, where the judgments of the Common Pleas and Mayor's Police Court were, on the 7th day of November, 1919, affirmed.

A duly certified transcript of the final record in said Mayor's Police Court, a transcript of the docket and journal entries of said court of Common Pleas and of said Court of Appeals, together with the original papers filed in said case, are filed herewith and made a part of this petition in error.

There is error in said records and proceedings, in this, to-wit:

1. The said Mayor's Police Court erred in overruling the demurrer of this plaintiff in error to the affidavit filed against him, and in upholding the constitutional validity of said act of the general assembly.

2. The said Mayor's Police Court erred in overruling the motion of this plaintiff in error in arrest of judgment.

3. The said Mayor's Police Court erred in overruling the motion of this plaintiff in error for a new trial.

4. The said Mayor's Police Court erred in finding the defendant therein guilty.

3      5. The Common Pleas Court of Cuyahoga county, Ohio, erred in affirming the judgment of said Mayor's Police Court and in dismissing the petition in error of this plaintiff in error.

6. The Court of Appeals of Cuyahoga county, Ohio, erred in affirming the judgment of the Common Pleas Court of Cuyahoga county, Ohio, and the judgment of the Mayor's Police Court of Garfield Heights, Ohio, and in dismissing the petition in error of this plaintiff in error.

Plaintiff in error therefore prays that said judgments be reversed and that he be restored to all things he has lost by reason thereof.

HARRY F. WITTENBRINK,  
GEO. B. OKEY,  
TIMOTHY S. HOGAN,  
*Attorneys for Plaintiff in Error.*

*Waiver.*

The defendant in error hereby waives the issuance and service of summons in error in this proceeding and hereby enters its appearance herein.

JOHN G. PRICE,  
*Attorney-General,*  
*Attorney for Defendant in Error.*

4 In the Court of Appeals, Cuyahoga County, Ohio.

[No. 2828.]

H. H. BOHNING, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Transcript of Docket and Journal Entries.*

1919, October 1.—Petition in error, waiver of process, transcript and original papers from Common Pleas filed.

1919, October 10.—Motion by plaintiff in error to advance case, with notice of motion filed.

1919, October 18.—Brief of plaintiff in error, with two copies filed.

October 17, 1919.—*To Court*: The motion to advance this case is heard and granted. Jour. 4, pg. 4.

November 7, 1919.—*To Court*: This cause came on to be heard upon the pleadings and the transcript of the record in the Court of Common Pleas, and was argued by counsel; and on consideration of all the assigned errors, the court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Court of Common Pleas is affirmed. It is therefore considered that said defendant in error recover of said plaintiff in error its costs herein. Ordered that a special mandate be sent to the Court of Common Pleas, to carry this judgment into execution. The plaintiff in error excepts. Jour. 4, pg. 18.

5 [Duly certified.]

*Petition in Error.*

[Filed October 1, 1919.]

The plaintiff in error says that on the 8th day of September, A. D. 1919, in the Mayor's Police Court of Garfield Heights, county of Cuyahoga and State of Ohio, in a case then pending therein, wherein the State of Ohio was plaintiff, and he the plaintiff in error, was defendant, a judgment was rendered in favor of said the State of Ohio, and against him, the said H. H. Bohning.

The plaintiff in error further says that he duly prosecuted a proceeding in error in the Court of Common Pleas of said county of Cuyahoga to reverse said judgment of said Mayor's Police Court of Garfield Heights, Ohio, but that on the 27th day of September A. D. 1919, said Court of Common Pleas affirmed the same.

A duly certified transcript of the final record in said Mayor's Police Court, together with the bill of exceptions taken in said court, and a duly certified transcript of the docket and the journal entries of said Court of Common Pleas together with the original papers

filed in that court, are filed herewith and made a part of this petition in error.

The plaintiff in error avers that in said judgments and proceedings in said Mayor's Police Court and Court of Common Pleas there is manifest error, to his prejudice, to-wit:

6        1. The said Mayor's Police Court erred in overruling the demurrer of said H. H. Bohning to the affidavit and information.

2. The said Mayor's Police Court erred in overruling the motion of the said H. H. Bohning to arrest the judgment in said case.

3. The said Mayor's Police Court erred in overruling the motion of said H. H. Bohning for a new trial.

4. The said Mayor's Police Court in imposing sentence and rendering judgment against said H. H. Bohning.

5. The said Common Pleas Court erred in affirming the judgment of said Mayor's Police Court.

6. The said Court of Common Pleas erred in refusing to reverse said judgment of said Mayor's Police Court.

7. Other errors apparent on the record.

Wherefore: the plaintiff in error prays that the said finding and judgments of said Mayor's Police Court and said Court of Common Pleas may be reversed, and that the court make such other order as may be right in the premises.

GEORGE B. OKEY,  
HARRY F. WITTENBRINK,  
*Attorneys for Plaintiff in Error.*

*Waiver.*

The defendant in error hereby waives the issuance and service of summons in error in this proceeding and hereby enters its appearance herein.

SAMUEL DOERFLER,  
*Attorney for Defendant in Error.*

7        In the Court of Common Pleas, Cuyahoga County, Ohio

[No. 17056.]

H. H. BOHNING, Plaintiff in Error,

vs.

STATE OF OHIO, Defendant in Error.

*Transcript of Docket and Journal Entries.*

1919, September 9.—Transcript and original papers from Joseph A. Schmidt, police justice of Garfield Heights.

1919, September 9.—To Court: Leave is hereby granted the plaintiff in error, to file a petition in error. Jour. 29, pg. 18.

1919, September 9.—Bill of exceptions filed.

September 9.—Petition in error and waiver of summons filed.

September 27, 1919.—To Court: This cause came on for hearing upon the petition in error, the transcript, and the original papers and pleadings from the court below, and was argued by counsel; on consideration whereof, the court find that there is no error apparent on the record in said proceedings and judgment. Jour. 29, pg. 107.

1919, October 1.—To Court: Appeal bond in this case is fixed in the sum of \$200.00. This day comes the plaintiff in error herein and gives recognizance No. 16317 in the sum of \$200.00 with  
8 Fred Albers, as surety. Jour. 29, pg. 119.

October 1, 1919.—Petition in error filed in Court of Appeals by plaintiff in error.

[Duly certified.]

*Petition in Error.*

[Filed September 9, 1919.]

The plaintiff in error says: That on the eighth day of September, A. D. 1919, in the Mayor's Police Court of Garfield Heights, Cuyahoga county, Ohio, in a case then pending therein, wherein the State of Ohio was plaintiff, and he, the plaintiff in error, was defendant, a judgment was rendered in favor of the said the State of Ohio and against him, the said H. H. Bohning.

A duly certified transcript of the final record, together with the bill of exceptions are filed herewith and made a part of this petition in error.

The plaintiff in error avers that in said judgment and proceedings in said Mayor's Police Court there is manifest error to his prejudice; to-wit:

1. The said court erred in overruling the demurrer of said H. H. Bohning to the affidavit and information;
2. The said court erred in overruling the motion of said H. H. Bohning to arrest the judgment in said case.
3. The said court erred in overruling the motion of said H. H. Bohning for a new trial.
4. The said court erred in imposing sentence and rendering judgment against said H. H. Bohning.
5. Other errors apparent on the record.

9 Wherefore the plaintiff in error prays: That, the said finding and judgment of said Mayor's Police Court may be

reversed, and that the court make such other order as may be right and proper in the premises.

GEO. B. OKEY,  
HARRY F. WITTENBRINK,  
*Attorneys for Plaintiff in Error.*

*Waiver.*

The defendant in error hereby waives the issuance and service of summons in error in the foregoing proceeding, and hereby enters its appearance herein.

SAMUEL DOERFLER,  
*Attorney for Defendant in Error.*

10 In the Mayor's Police Court, Garfield Heights, Cuyahoga County, Ohio.

[No. 129.]

THE STATE OF OHIO

vs.

H. H. BOHNING.

*Transcript.*

September 8, 1919.

This day came Henry Weber, who, being first duly sworn according to law, deposes and says: That on or about the eighth day of September, A. D. 1919, at the county of Cuyahoga and in the village of Garfield Heights in said county, H. H. Bohning, H. F. Rahn and August Koenig, being then and there the duly authorized and acting board of trustees of a certain private or parochial school, conducted in the premises known as St. John's Evangelical Lutheran-Congregation School, at the corner of Granger road and Turney road in said village of Garfield Heights, did order and cause one Emil Pohl, a teacher in the employ and under the control of said board of trustees, to teach the German language in said school, who has not completed a course of study equivalent to that prescribed in the first seven grades of the Elementary schools of the State of Ohio and that said Emil Pohl, in obedience to said order, did teach the

11 German language, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

(Signed)

HENRY WEBER.

Sworn to before me by the said Henry Weber and by him subscribed in my presence this eighth day of September, A. D. 1919.

(Signed)

JOSEPH A. SCHMITT,  
*Police Justice.*

Complaint filed.

Warrant issued to Henry Weber, marshal of said village of Garfield Heights, for the defendant, H. H. Bohning, who made return as follows, to wit:

September 8, 1919.

I took the body of the within named H. H. Bohning and have him before the magistrate within named.

(Signed)

HENRY WEBER,  
*Marshal.*

September 8, 1919.—Defendant demurred and filed a written demurrer to the information and affidavit. Argued by counsel. Counsel for defendant filed a written brief in support of said demurrer.

To Court: Demurrer overruled; to which finding, decision and ruling of the court the defendant, by his counsel, then and there excepted; exceptions noted.

The defendant, H. H. Bohning, being now brought before me to answer said complaint, pleaded "not guilty," and in a writing subscribed by him duly filed, waived a jury and submitted to be tried for the offense charged in said complaint by me.

Having heard the evidence, the court finds the said H. H. Bohning guilty as charged in the affidavit.

September 8, 1919.—Motion in arrest of judgment filed by defendant.

12 September 8, 1919.—Motion for a new trial filed by the defendant.

Both motions argued by counsel for defendant.

September 8, 1919.—To Court: Motion in arrest of judgment and motion for a new trial overruled. Defendant excepts and exceptions noted.

Defendant ordered to pay a fine to the State of Ohio in the sum of \$25 and the costs of this prosecution.

September 8, 1919.—Defendant gave notice of his intention to apply for leave to file a petition in error.

To Court: Ordered that the said defendant be released on his personal recognizance and that execution of this sentence be suspended until further order.

September 8, 1919.—Defendant presented his bill of exceptions.

To Court: Bill of exceptions allowed, signed and sealed by the court and is made a part of the record of this case, but is not to be recorded or spread at large upon the journal.

September 8, 1919.—Bill of exceptions filed.

[Duly certified.]

*Affidavit.*

THE STATE OF OHIO,  
Cuyahoga County, ss:

Before me Joseph A. Schmidt justice of Mayor's Police Court, Garfield Heights village personally came Henry Weber who, being

first duly sworn according to law, deposes and says: That, on or about the 8th day of September A. D. 1919, at the county of Cuyahoga, and in the village of Garfield Heights in said county.

13 H. H. Bohning, H. F. Rahe and August H. Koenig being then and there the duly authorized and acting board of trustees of a certain private or parochial school, conducted in the premises known as St. John's Evangelical Lutheran Congregation School, at the corner of Granger Road and Turney Road in said village of Garfield Heights did order and cause one Emil Pohl a teacher in the employ and under the control of said Board of Trustees, to teach the German language to pupils in said school, who had not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools of the State of Ohio, and that said Emil Pohl in obedience of said order did teach the German language contrary to the form of the state in such case made and provided and against the peace and dignity of the State of Ohio.

HENRY WEBER.

Sworn to before me by the said Henry Weber and by him subscribed in my presence this 8th day of September, A. D. 1919.

JOSEPH A. SCHMITT,

*Police Justice.*

*Demurrer to Information.*

[Filed September 8, 1919.]

The said H. H. Bohning, demurs to the information and affidavit because the facts stated therein do not constitute an offense against the laws of the State of Ohio.

GEO. B. OKEY,

HARRY F. WITTENBRINK,

*Attorneys for Defendants.*

14

*Motion in Arrest of Judgment.*

[Filed September 8, 1919.]

Now come the defendant, H. H. Bohning, and moves the court to arrest the judgment in this case, for the reason that the facts stated in the information and affidavit do not constitute an offense.

GEO. B. OKEY,

HARRY F. WITTENBRINK,

*Attorneys for Defendants.*

*Motion for New Trial.*

[Filed September 8, 1919.]

The defendant, H. H. Bohning, now comes and moves the court for a new trial in this case, for the reasons following; to-wit:

1. The finding of conviction is contrary to the evidence;

2. The finding of conviction is contrary to law;
3. Other errors apparent on the record.

GEO. B. OKEY,  
HARRY F. WITTENBRINK,  
*Attorneys for Defendants.*

15

*Bill of Exceptions.*

[Filed September 8, 1919.]

Be it remembered: That, on the 8th day of September A. D. 1919, this cause came on to be heard before Honorable Joseph A. Schmitt judge of said court, upon the demurrer of the defendants to the information and affidavit: On consideration whereof, the court overruled said demurrer, to which ruling the defendants then and there, by their counsel, at the time excepted and still except.

Thereupon, on the same day, the case came on for trial, and the jury being waived, counsel representing the State and the defendants, in open court, entered upon the following stipulation and agreed statement of facts:

"It is hereby stipulated and agreed by and between counsel on behalf of the State and the defendants that a jury be waived and that the case be submitted to the court, upon the following agreed facts:

"On the 8th day of September, 1919, the said H. H. Bohning, H. F. Rahe and August H. Koeing constituted the board of trustees of a certain parochial and private school known as St. John's Evangelical Lutheran Congregation School, located at the corner of Granger road and Turney road, in the village of Garfield Heights, county of Cuyahoga and State of Ohio, and that on said day the said H. H. Bohning, H. F. Rahe and August H. Koeing, being then and there the duly authorized Board of Trustees of said afore-

16 said school, did order and cause one, Emil Pohl, a teacher under the control of said Board of Trustees, to teach the German language to the pupils in said parochial school who had not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools of the State of Ohio; and that said Emil Pohl, in obedience to said order did teach the German language and that said parochial school is maintained by the voluntary contributions of the pupils and their parents and others interested in the educational purposes of the Evangelical Lutheran Church, but that said school is free, open and available to all persons, without discrimination or distinction, creed, condition, race or otherwise." That the said St. John's Evangelical Lutheran Congregation School being a parochial and private school does not receive any part of the public school funds of the State of Ohio."

And there was no other evidence offered, introduced or admitted by either the State or defendants in the trial of this case, the fore-



going stipulation and agreed statement of facts being all the evidence given or offered by either side upon the trial.

Whereupon, a jury having been waived by the defendants, the court found the defendants guilty, as charged in the information, as appears of record in the case; and the defendants thereafter, within three days, filed a motion in arrest of judgment and a motion to set aside the said finding, judgment and decision and for a new trial, and the same was argued by counsel and submitted to the court, which, upon consideration, overruled the same, as appears of record.

17 And the defendants thereupon, at the time, excepted to the ruling *and* the court in overruling said motion in arrest of judgment and for a new trial, and still except. Bill of exceptions, p. 2.

And the court thereupon imposed sentence upon the defendants, as appears of record, to which sentence and judgment the defendants thereupon at the time excepted and still except.

The defendants thereupon presented this their bill of exceptions and prayed that the same be allowed, signed, sealed and filed as a part of the record in said case, but not spread at large upon the journal, according to the statute in such case made and provided, all of which is accordingly done this 8th day of September, A. D. 1919.

JOSEPH A. SCHMITT,  
*Police Justice.*

18 UNITED STATES OF AMERICA, ss:

Supreme Court of Ohio.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the Seal of said Supreme Court of Ohio, in the City of Columbus, this 19th day of September, A. D. 1921.

[Seal of the Supreme Court of the State of Ohio.]

W. C. LAWRENCE,  
*Clerk of the Supreme Court of Ohio.*

In the Supreme Court of Ohio.

No. 16493.

H. H. BOHNING, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Petition of H. H. Bohning for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.*

To the Honorable C. T. Marshall, Chief Justice of the Supreme Court of the State of Ohio:

H. H. Bohning, Plaintiff in Error in the above entitled cause, shows by this Petition to this Honorable Court, that in the records, proceedings and decisions in the Supreme Court of the State of Ohio, the same being the highest court of said State in which a decision could be had in this suit, manifest error has occurred, greatly to the damage of said H. H. Bohning.

That, as appears in the record and proceedings, there was drawn in question the validity of an Act of the General Assembly of the State of Ohio, passed May 8, 1919, and approved by the Governor, June 5, 1919, entitled:

“An Act

To supplement section 7762 of the General Code by the addition of supplemental sections to be known as sections 7762-1, 7762-2, 7762-3, and 7762-4, and to repeal section 7729, concerning elementary, private, and parochial schools, and providing that instruction shall be in the English language.”

Said H. H. Bohning further says that in this cause, on the 7th day of June, 1921, final judgment was rendered against him by the Supreme Court of the State of Ohio, that being the highest court of law in said State of Ohio, wherein it was adjudged that the Court of Appeals of Cuyahoga County, Ohio, did not err in its judgment affirming the judgment of the Court of Common Pleas of Cuyahoga county, Ohio, which latter Court affirmed the judgment of the Mayor's Police Court of Garfield Heights, Cuyahoga county, Ohio, and held that said Mayor's Police Court did not err at the trial of said cause in said court in sustaining the validity of said Act; and said Supreme Court of the State of Ohio therein affirmed the judgment of said Court of Appeals and said lower courts; and in said cause further adjudged that said Act of the General Assembly of the State of Ohio was a valid law, and the conviction of said H. H. Bohning thereunder was not repugnant to Section 1 of Art. XIV, being the Fourteenth Amendment to the Constitution of the United States, which ordains:

\* \* \* "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

All of which, to the prejudice of said H. H. Bohning fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

Wherefore your petitioner prays for an allowance of a Writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and the Judges thereof, to the end that the record in this case may be removed into the Supreme Court of the United States and the errors complained of by your petitioner may be examined and corrected and said judgment reversed, and said cause remanded, as provided by law; and that your petitioner may have such other and further relief in the premises as may be adjudged; and your petitioner will ever pray.

(Signed)

H. H. BOHNING,  
By TIMOTHY S. HOGAN AND  
GEO. B. OKEY,  
*His Attorneys.*

The Writ of Error as prayed in the foregoing Petition is hereby allowed this 29th day of August, 1921.

Dated at the City of Columbus, Ohio, this 29<sup>th</sup> day of August, 1921.

C. T. MARSHALL,  
*Chief Justice of the Supreme Court  
of the State of Ohio.*

20½ [Endorsed:] 16493. Filed Aug. 29, 1921. Supreme Court of Ohio. W. C. Lawrence, Clerk.

21 In the Supreme Court of Ohio.

No. 16493.

H. H. BOHNING, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.*

On this 29th day of August, 1921, the application of H. H. Bohning, Plaintiff in Error and the State of Ohio, Defendant in Error, for a Writ of Error, came on to be heard, and it appearing to the Court from the Petition filed herein and from the record and the

proceedings filed therewith that said application should be granted, and that a transcript of the record, proceedings and papers, upon which the judgment of the Court was rendered, properly certified, should be sent to the Supreme Court of the United States in accordance with the prayer of said Petition in order that such proceedings may be had as may be just and proper:

Now, therefore, it is ordered that the Writ of Error be allowed, and that a true copy of the record, Assignment of Errors, and all proceedings in the case of the Supreme Court of the State of Ohio shall be transmitted to the Supreme Court of the United States duly certified according to law, in order that said Court may inspect the same and take such action therein as it deems proper according to law.

C. T. MARSHALL,  
*Chief Justice of the Supreme Court  
 of the State of Ohio.*

Journal 28 page 694.

21½ [Endorsed:] 16493. Filed Aug. 29, 1921. Supreme Court of Ohio. W. C. Lawrence, Clerk.

22 In the Supreme Court of Ohio.

No. 16493.

H. H. BOHNING, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.*

Now comes H. H. Bohning in connection with his petition for a Writ of Error herein, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Ohio in the above entitled case, there is manifest error in this to wit:

First. The Supreme Court of the State of Ohio erred in affirming the judgment of the Court of Appeals of Cuyahoga county, Ohio, and in refusing to reverse said judgment and remand the cause to the Court of Appeals of Cuyahoga county, Ohio, for further proceedings.

Second. The Supreme Court of the State of Ohio should have found that said Court of Appeals of Cuyahoga county, Ohio, erred in affirming the judgment of the Court of Common Pleas of Cuyahoga county, Ohio, affirming the judgment of the Mayor's Police Court of Garfield Heights, Cuyahoga county, Ohio, convicting said H. H. Bohning with having violated an Act of the General Assembly of the State of Ohio passed May 8, 1919, approved June 5, 1919, entitled:

“An Act

23      To supplement section 7762 of the General Code, by the addition of supplemental sections to be known as sections 7762-1, 7762-2, 7762-3, and 7762-4, and to repeal section 7729, concerning elementary, private, and parochial schools, and providing that instruction shall be in the English language.”

Third. The judgment of the said Supreme Court of Ohio was given for said State of Ohio when it should have been given in favor of said H. H. Bohning.

Fourth. The judgment of the Supreme Court of the State of Ohio, in this case, is in contravention of Section 1 of Art. XIV, being the Fourteenth Amendment to the Constitution of the United States, which declares:

\* \* \* “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Fifth. The Supreme Court of the State of Ohio erred in holding that the Act of the General Assembly of the State of Ohio passed May 8, 1919, approved June 5, 1919, entitled:

“An Act

To supplement section 7762 of the General Code by the addition of supplemental sections to be known as sections 7762-1, 7762-2, 7762-3, and 7762-4, and to repeal section 7729, concerning elementary, private and parochial schools, and providing that instruction shall be in the English language,”

was not in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States, notwithstanding said Act, and the conviction of said H. H. Bohning thereunder, assumes to deprive and to deny to said H. H. Bohning the privilege and immunity as a citizen of the United States, and of his liberty as such citizen, without due process of law, to instruct pupils in the German Language, in private and parochial schools, who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of the State of Ohio.

TIMOTHY S. HOGAN,  
GEO. B. OKEY,  
*Attorneys for H. H. Bohning.*

23½      [Endorsed:] 16493. In the Supreme Court of Ohio.  
H. H. Bohning, Plaintiff in Error, vs. The State of Ohio,  
Defendant in Error. Assignment of Errors. Filed Aug. 29, 1921.  
Supreme Court of Ohio, W. C. Lawrence, Clerk.

In the Supreme Court of Ohio.

No. 16493.

H. H. BOHNING, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Writ of Error from the Supreme Court of the United States to the  
Supreme Court of the State of Ohio.*

THE UNITED STATES OF AMERICA, ss:

he President of the United States of America to the Honorable  
Judges of the Supreme Court of the State of Ohio, Greeting:

Whereas, in the record and proceedings and in the rendition of  
the judgment in the above entitled cause which is now before you,  
or some of you, between H. H. Bohning, Plaintiff in Error, and the  
State of Ohio, Defendant in Error, your court being the highest  
court of said State of Ohio having jurisdiction of the cause, there  
has been drawn in question the validity of a statute of the State of Ohio  
and an authority exercised under said statute, on the ground of its  
being repugnant to the Constitution of the United States, and the  
decision is in favor of its validity; and whereas there is manifest  
error in said judgment to the great damage of said H. H. Bohning;  
and whereas we are willing that if there is error it should be duly  
corrected, we command you therefore, if judgment be given therein,  
that you send under seal of your court the record and proceedings  
in said cause to the Supreme Court of the United States together with  
this Writ, within such time as may be necessary, in order that you  
may have the same in Washington on the 5th day of October,  
1921, in the said Supreme Court of the United States, to be  
then and there held, that the record and proceedings aforesaid  
may be then inspected by the Supreme Court of the United States  
and that said Supreme Court of the United States may cause further  
to be done therein, to correct that error, what of right and according  
to the law and custom of the United States ought to be done.

(Witness) The Honorable William H. Taft, Chief Justice of the  
Supreme Court of the United States, the 5 day of September, A. D.,  
1921.

[Seal of United States District Court, Southern Dis., Ohio.]

B. E. DILLEY,

*Clerk of the United States District Court for the  
Southern District of Ohio, Eastern Division.*

Allowed

C. T. MARSHALL,

*Chief Justice of the Supreme Court of Ohio.*

25½ [Endorsed:] Filed Sep. 5, 1921. Supreme Court of Ohio.  
W. C. Lawrence, Clerk.

26 In the Supreme Court of the United States.

No. 16493.

H. H. BOHNING, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Citation.*

THE UNITED STATES OF AMERICA, ss:

To Honorable John G. Price, Attorney General of the State of Ohio, and to Honorable Edward C. Stanton, Prosecuting Attorney of Cuyahoga County, Ohio, Greetings:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington in the District of Columbia, on the — day of —, A. D. 1921, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Ohio from a final judgment signed, filed and entered therein on the 7th day of June, 1921, in a proceeding therein pending wherein H. H. Bohning is Plaintiff in Error and the State of Ohio is Defendant in Error, to show cause if any there be why the judgment rendered against said H. H. Bohning as in said Writ of Error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

C. T. MARSHALL,  
*Chief Justice of the Supreme Court  
of the State of Ohio.*

Dated this 29th day of August, 1921.

Copy of the above Citation received this 2nd day of September 1921, at Columbus, Ohio, and the appearance of the State of Ohio is hereby entered.

\_\_\_\_\_  
*Attorney-General of the State of Ohio.*  
EDWARD C. STANTON,  
*Prosecuting Attorney of Cuyahoga County, Ohio.*

26½ [Endorsed:] 16493. Filed Sep. 19 1921. Supreme Court of Ohio, W. C. Lawrence, Clerk.

27 In the Supreme Court of the United States.

No. 16493.

H. H. BOHNING, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Stipulation as to Transcript of Record.*

Columbus, Ohio, August 31st, 1921.

The undersigned counsel for the respective parties in this cause hereby stipulate that the Clerk of the Supreme Court shall make a transcript of, and shall certify and transmit the entire record in this cause, including all pleadings, opinions and proceedings in this court and a certified copy of the docket and journal entries in this court.

TIMOTHY S. HOGAN,

GEO. B. OKEY,

*Attorneys for H. H. Bohning.*

\_\_\_\_\_,  
*Attorney General of Ohio.*

EDWARD C. STANTON,

*Prosecuting Attorney of Cuyahoga County, Ohio.*

27½ [Endorsed:] Filed Sep. 19 1921. Supreme Court of  
Ohio, W. C. Lawrence, Clerk.

28 #17493.

Know all men by these presents, That we, H. H. Bohning, as principal, and Royal Indemnity Co., as sureties, are held and firmly bound unto The State of Ohio in the full and just sum of two hundred and fifty (\$250.00) dollars, to be paid to the said obligee and its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 7th day of September, in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, lately at the January, 1921, term of the Supreme Court of the State of Ohio in a suit depending in said court, between H. H. Bohning, plaintiff-in-error, and the State of Ohio, defendant-in-error, a judgment was rendered against the said H. H. Bohning, and the said H. H. Bohning having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Honorable John G. Price, Attorney General of the State of Ohio, and to Honorable Edward C. Stanton, Prosecuting Attorney of Cuyahoga County, Ohio, citing and admonishing them to be and



appear at the Supreme Court of the United States, at Washington within — days from the date thereof.

Now, the condition of the above obligation is such, That if the said H. H. Bohning shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

H. H. BOHNING, [SEAL.]  
 ROYAL INDEMNITY CO., [SEAL.]  
 By L. J. O'DONNELL, [SEAL.]  
*Attorney-in-fact.*

Sealed and delivered in presence of

EDWARD P. HOGAN.  
 T. S. HOGAN.

Approved by—

C. T. MARSHALL,  
*Chief Justice of the Supreme  
 Court of the State of Ohio.*

28½ [Endorsed:] 17493. Application made Sept. 7th, 1921.  
 C. T. Marshall, Chief Justice. H. H. Bohning vs. State of  
 Ohio. Copy of Bond. Filed Sep. 8, 1921. Supreme Court of  
 Ohio, W. C. Lawrence, Clerk.

29 Supreme Court of the State of Ohio, January Term, A. D.  
 1919.

(Minute Book No. 35, Page 293.)

Number 16493.

Title of Case.

H. H. BOHNING, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

Action: Error to the Court of Appeals of Cuyahoga County.

Attorneys: Harry F. Wittenbrink, Cleveland; George B. Okey  
 T. S. Hogan, Columbus, Ohio, for plaintiff in error.

John G. Price, Attorney General, Columbus, Ohio; E. C. Staton,  
 Prosecuting Attorney, R. A. Baskin, F. J. Merrick, Cleveland,  
 Ohio, for defendant in error.

*Transcript of Docket Entries, Memoranda of Pleadings, &c., Filed, Writs Issued, Judgments, Orders, and Decrees.*

1920.

- Jan. 8. Petition in Error and Waiver of Summons filed.  
 " " Court of Appeals transcript, original papers and bill of exceptions filed.  
 " " Papers taken by Toothaker & Rodenfels. 1.29/20—Returned.  
 " 21. Printed Record (12) filed; 1/22/20—Proof of service filed.  
 Mar. 9. Entry for extension of time to file brief, filed.  
 " " \* \* \* Order extending time for Plaintiff's Printed Briefs to May 17, 1920—by consent. H. L. Nichols, C. J. Journal 28, page 392.  
 May 15. Consent entry extending time to file briefs, filed.  
 " " \* \* \* Order extending time for plaintiff's briefs to July 1, 1920. Nichols, C. J. Journal 28, page 429.  
 Jun. 30. Plaintiff's printed briefs filed. 7/1/20—Proof of service filed.  
 Dec. 17. Defendant's printed briefs filed. 12/20/20—Proof of service filed.

1921.

- Feb. 23. Plaintiff's Printed Reply. Briefs filed.  
 Jun. 7. \* \* \* Judgment Affirmed. Journal 28, page 646.  
 Jun. 14. Mandate Issued.  
 " " Original papers sent to Clerk.  
 Aug. 29. Petition for writ of error from Supreme Court of United States to Supreme Court of Ohio, filed.  
 " " Assignment of Errors and an order of allowance by Chief Justice C. T. Marshall, filed.  
 Aug. 29. \* \* \* Order allowing writ of error. C. T. Marshall, C. J. Journal 28, page —.  
 Sep. 5. Writ of Error filed.  
 " " Petition for writ, Assignment of errors and writ of error taken by Hogan and Hogan.  
 " 8. Bond on writ of error with Royal Indemnity Company of New York, as surety filed.  
 " 19. Stipulation as to transcript of record filed.  
 " " Citation and entry of appearance of defendant filed.

*Transcript of Journal Entries.*

No. 16493.

H. H. BOHNING

vs.

THE STATE OF OHIO.

1920.

March 9. "On application, the time within which the plaintiff in error is required to file his printed brief or argument herein is hereby extended until the 17th day of May 1920.

Approved:

HUGH L. NICHOLS,  
*Chief Justice.*"

Journal 28, page 392.

May 18. "On application, the time for filing brief of the plaintiff in error herein is extended to the first day of July 1920.

Approved:

HUGH L. NICHOLS,  
*Chief Justice.*"

Journal 28, page 429.

1921.

June 7. "This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said Court of Appeals be and the same is hereby affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at \$—. Ordered, That a special mandate be sent to the Common Pleas Court of Cuyahoga County, to carry this judgment into execution. Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County "for entry."

Journal 28, page 646.

31

16493.

(Nos. 16492 and 16493—Decided June 7, 1921.)

POHL

v.

THE STATE OF OHIO.

BOHNING

v.

THE STATE OF OHIO.

Error to the Court of Appeals of Cuyahoga County.

Constitutional law—Compulsory education—Teaching by English language only—Sections 7762-1 and 7762-2, General Code—German language prohibited, when—Public, private and parochial schools.

The plaintiff in error in each of the above entitled causes was convicted and sentenced to pay a fine of twenty-five dollars and costs in the mayor's police court of the village of Garfield Heights, Cuyahoga county, Ohio, Emil Pohl, having been a teacher, and H. H. Bohning, a member of the board of trustees, of a certain parochial school, known as St. John's Evangelical Lutheran Congregational School, in the village of Garfield Heights, it appearing that Pohl did on the 8th day of September, 1919, in said village, impart instructions in and teach the German language to pupils in such school who had not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools of the state of Ohio, and that Bohning, as a member of the board of trustees of such school, did cause Pohl to impart instruction and teaching as aforesaid, contrary to the provisions of Sections 7762-1, 7762-2 and 7762-3, General Code. Error was prosecuted to the common pleas court, where the judgment of the mayor's court was affirmed; error prosecuted to the court of appeals, where the judgments of the common pleas court and the mayor's court were affirmed; and error prosecuted here to the judgments of the courts below, the only question here made being as to the constitutionality of the sections of the Code above referred to.

Mr. Harry F. Wittenbrink; Mr. George B. Okey and Mr. Timothy S. Hogan, for plaintiffs in error.

Mr. John G. Price, attorney general; Mr. R. A. Baskin, prosecuting attorney; and Mr. Frank J. Merrick, assistant prosecuting attorney, for defendant in error.

By the COURT:

While much consideration in arguments and briefs has been given to the wisdom of the provisions of Sections 7762-1 and 7762-2,

General Code, this court is of opinion that such argument might better be addressed to the legislative branch of the government.

Courts do not sit to review the wisdom of legislative acts, nor do they possess such power. On the contrary, the policy, the advisability, and the wisdom of all legislation, subject to the veto of the governor and the referendum of the people, are subjects for legislative determination exclusively. The inexpediency, injustice or impropriety of a legislative act are not grounds upon which the court may declare the act void. The remedy for such evils must be sought by an appeal to the justice and patriotism of the legislature itself.

Except as limited by the Federal and State Constitutions, the power of the general assembly to legislate is inherent and unlimited and covers the whole range of legitimate legislation.

If the general assembly in the exercise of its power to legislate enacts laws necessary for the welfare of society, and thereby makes unlawful conduct theretofore lawful, such legislation will not be held to be unconstitutional simply because it forbids the doing of things theretofore permitted. The enjoying and defending life and liberty and seeking and obtaining happiness do not contemplate that they shall be enjoyed, sought and obtained as they were enjoyed, sought and obtained by primitive man, but that they shall be enjoyed, sought and obtained with such regard to the rights of society as the common welfare, as defined by the legislature, requires. It is upon this theory that our system of government exists.

The legislation in question is of equal application to every pupil of the state who has not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools, regardless of nationality, ancestry, or place of birth, and is, therefore, of equal operation upon every person within the designated grade.

33 The constitutionality of the act under consideration is, therefore, dependent upon whether the common welfare required such legislation. The legislature is presumed to have had before it such information with reference to the effect of the teaching of the German language to the youth of the state below the eighth grade as justified it in concluding that the common welfare required the prohibition of such teaching to such youth, and if the legislature found such facts to exist as to warrant it in the enactment of the sections in question it is not within the province of a court to redetermine the existence or nonexistence of such facts, even though the court might upon such redetermination reach a different conclusion. If under any possible state of facts the sections would be constitutional, this court is bound to presume that such facts exist.

No principle is better established by the decisions of the federal and state courts than that the possession and enjoyment of all rights are subject to such reasonable regulations as are deemed by the legislative authority to be essential to the welfare of the state, and every intendment is to be made in favor of the validity and lawfulness of such regulations unless they are clearly unreasonable and violative of some express provision of the constitution.

For these reasons we are unable to reach the conclusion that

Sections 7762-1 and 7762-2 are unconstitutional, and the judgment of the court of appeals will, therefore, be affirmed.

Judgment affirmed.

Marshall, C. J., Johnson, Hough, Wanamaker, Robinson, Jones and Matthias, JJ., concur.

34      STATE OF OHIO,  
            *City of Columbus:*

Supreme Court of the State of Ohio, of the Term of January, A. D., 1921.

I, J. L. W. Henney, Reporter of the Supreme Court of Ohio, do hereby certify that the foregoing transcript, consisting of three (3) pages, constitutes a full, true and correct copy of the per curiam opinion of the Supreme Court of Ohio (concurring in by Marshall, C. J., Johnson, Hough, Wanamaker, Robinson, Jones and Matthias, JJ.), in Cause No. 16493, Bohning v. The State of Ohio, as the originals thereof appear on file and of record in this office, as of the date of this certificate.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 29th day of August, A. D., 1921.

[Seal of the Supreme Court of the State of Ohio.]

J. L. W. HENNEY,  
*Reporter.*

35                      *Certificate of Lodgment.*

STATE OF OHIO, ss:

Supreme Court.

I, Wilbur C. Lawrence, Clerk of the said Court, do hereby certify that there was lodged with me as said Clerk, on the date set forth below, in the case of H. H. Bohning, Plaintiff in Error vs. The State of Ohio, Defendant in Error,

1. Two copies of the writ of error, as herein set forth, one for the defendant in error and one to file in my office, the same being lodged with me on August 29th, 1921.

2. The original bond, a copy of which is herein set forth, the same being lodged with me on September 7th, 1921, and presented to the Chief Justice, Hon. C. T. Marshall on that date, and returned and filed in my office on September 8th, 1921.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at my office in Columbus, Ohio, this 19th day of September, A. D. 1921.

[Seal of the Supreme Court of the State of Ohio.]

W. C. LAWRENCE,  
*Clerk of the Supreme Court of Ohio.*

Supreme Court of the State of Ohio.

No. 16493.

H. H. BOHNING, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Authentication of Record.*

THE STATE OF OHIO,  
*City of Columbus, ss:*

I, Wilbur C. Lawrence, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, writ of error, citation to defendant and entry of appearance, and stipulation as to transcript of record are the original papers filed in this Court in the above entitled cause; that the foregoing copy of the bond is a true copy of the bond filed in said cause; that the printed copy of the record attached hereto is a true copy of the printed record filed in said cause; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the Records of said Court, and that a duly certified copy of the opinion of the Supreme Court of Ohio is hereto attached.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio this 19th day of September, A. D. 1921.

[Seal of the Supreme Court of the State of Ohio.]

W. C. LAWRENCE,  
*Clerk of the Supreme Court of Ohio.*

Endorsed on cover: File No. 28,516. Ohio Supreme Court Term No. 561. H. H. Bohning, plaintiff in error, vs. The State of Ohio. Filed October 1st, 1921. File No. 28,516.

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921. 1922

No. 182

EMIL POHL, PLAINTIFF IN ERROR,

vs.

THE STATE OF OHIO.

---

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

---

FILED OCTOBER 1, 1921.

(28,517)



(28,517)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 562.

EMIL POHL, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF OHIO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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Supreme Court of Ohio.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

Error to the Court of Appeals, Cuyahoga County, Ohio.

RECORD.

Harry F. Wittenbrink,  
Geo. B. Okey,  
Timothy S. Hogan,  
Attorneys for Plaintiff in Error.

John G. Price,  
Attorney-General,  
Attorney for Defendant in Error.

Filed Jan. 21, 1920. Supreme Court of Ohio. W. C. Lawrence,  
Clerk.

Supreme Court of Ohio.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Petition in Error.*

[Filed January 8, 1920.]

Plaintiff in error says that on the 8th day of September, 1919, by the judgment of the Mayor's Police Court of the village of Garfield Heights, county of Cuyahoga and state of Ohio, he was found guilty by said court, and fined \$25.00 and costs, for a violation of the act of the General Assembly of the state of Ohio, entitled "An act to supplement section 7762 of the general code, by the addition of supplemental sections 7762-1, 7762-2, 7762-3 and 7762-4, and to repeal section 7729, concerning elementary private and parochial schools and providing that instruction shall be in the English language," passed May 8, 1919, approved June 5, 1919; that a demurrer was interposed to the affidavit filed against him in said court, which was overruled; that motions were made by him

in said court in arrest of judgment and for a new trial were overruled; that error was prosecuted in the Common Pleas Court of Cuyahoga county, Ohio, where the judgment of said Mayor's Police Court was affirmed, and the petition in error was dismissed; that error was prosecuted in the Court of Appeals of Cuyahoga county, Ohio, where the judgment of the Common Pleas and Mayor's Police Court were, on the 7th day of November, 1919, affirmed.

A duly certified transcript of the final record in said Mayor's Police Court, a transcript of the docket and journal entries of said Court of Common Pleas and of said Court of Appeals, together with the original papers filed in said case, are filed herewith and made a part of this petition in error.

There is error in said records and proceedings, in this, to-wit:

1. The said Mayor's Police Court erred in overruling the demurer of this plaintiff in error to the affidavit filed against him, and in upholding the constitutional validity of said act of the general assembly.

2. The said Mayor's Police Court erred in overruling the motion of this plaintiff in error in arrest of judgment.

3. The said Mayor's Police Court erred in overruling the motion of this plaintiff in error for a new trial.

4. The said Mayor's Police Court erred in finding the defendant therein guilty.

5. The Common Pleas Court of Cuyahoga county, Ohio, erred in affirming the judgment of said Mayor's Police Court and in  
4 dismissing the petition in error of this plaintiff in error.

6. The Court of Appeals of Cuyahoga county, Ohio, erred in affirming the judgment of the Common Pleas Court of Cuyahoga county, Ohio, and the judgment of the Mayor's Police Court of Garfield Heights, Ohio, and in dismissing the petition in error of this plaintiff in error.

Plaintiff in error therefore prays that said judgments be reversed and that he be restored to all things he has lost by reason thereof.

HARRY F. WITTENBRINK,

GEO. B. OKEY,

TIMOTHY S. HOGAN,

*Attorneys for Plaintiff in Error.*

*Waiver.*

The defendant in error hereby waives the issuance and service of summons in error in this proceeding and hereby enters its appearance herein.

JOHN G. PRICE,

*Attorney-General,*

*Attorney for Defendant in Error.*

5 In the Court of Appeals, Cuyahoga County, Ohio.

[No. 2827.]

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Transcript of Docket and Journal Entries.*

1919, October 1.—Petition in error, waiver of process, transcript and original papers from Common Pleas filed.

1919, October 10.—Motion by plaintiff in error to advance case, with notice of motion filed.

1919, October 18.—Brief of plaintiff in error, with two copies filed.

1919, October 17.—*To Court*: The motion to advance this case is heard and granted. Jour. 4, pg. 4.

November 7, 1919.—*To Court*: This cause came on to be heard upon the pleadings and the transcript of the record in the Court of Common Pleas, and was argued by counsel; and on consideration of all the assigned errors, the court being of the opinion that substantial justice has been done the party complaining, the judgment of the said Court of Common Pleas is affirmed. It is therefore considered that said defendant in error recover of said plaintiff in error its costs herein. Ordered that a special mandate be sent to the Court of Common Pleas, to carry this judgment into execution. The plaintiff in error excepts. Jour. 4, pg. 18.

[Duly certified.]

*Petition in Error.*

[Filed October 1, 1919.]

The plaintiff in error says that on the 8th day of September, A. D. 1919, in the Mayor's Police Court of the village of Garfield Heights, county of Cuyahoga and State of Ohio, in a case then pending therein, wherein the State of Ohio was plaintiff, and he, the plaintiff in error, was defendant, a judgment was rendered in favor of said the State of Ohio, and against him, the said Emil Pohl.

The plaintiff in error further says that he duly prosecuted a proceeding in error in the Court of Common Pleas of said county of Cuyahoga to reverse said judgment of the said Mayor's Police Court of Garfield Heights, Ohio, but that on the 27th day of September A. D. 1919, said Court of Common Pleas affirmed the same.

A duly certified transcript of the final record in said Mayor's Police Court, together with the bill of exceptions taken in said court, and a duly certified transcript of the docket and the journal entries of said Court of Common Pleas, together with the original papers

filed in that court, are filed herewith and made a part of this petition in error.

The plaintiff in error avers that in said judgments and proceedings in said Mayor's Police Court and Court of Common Pleas there is manifest error, to his prejudice, to-wit:

1. The said Mayor's Police Court erred in overruling the demurrer of said Emil Pohl to the affidavit and information.

2. The said Mayor's Police Court erred in overruling the motion of the said Emil Pohl to arrest the judgment in said case.

3. The said Mayor's Police Court erred in overruling the motion of said Emil Pohl for a new trial.

4. The said Mayor's Police Court erred in imposing sentence and rendering judgment against said Emil Pohl.

5. The said Common Pleas Court erred in affirming the judgment of said Mayor's Police Court.

6. The said Court of Common Pleas erred in refusing to reverse said judgment of said Mayor's Police Court.

7. Other errors apparent on the record.

Wherefore the plaintiff in error prays that the said findings and judgments of said Mayor's Police Court and said Court of Common Pleas may be reversed, and that the court make such other order as may be right in the premises.

GEORGE B. OKEY,  
HARRY WITTENBRINK,  
*Attorneys for Plaintiff in Error.*

*Waiver.*

The defendant in error hereby waives the issuance and service of summons in error in this proceeding and hereby enters its appearance herein.

SAMUEL DOERFLER,  
*Attorney for Defendant in Error.*

8 In the Court of Common Pleas, Cuyahoga County, Ohio.

[No. 17055.]

EMIL POHL, Plaintiff in Error,  
vs.

THE STATE OF OHIO, Defendant in Error.

*Transcript of Docket and Journal Entries.*

1919, September 9.—Transcript and original papers from Joe Schmidt, police justice of Garfield Heights.

1919, September 9.—*To Court*: Leave is hereby granted the plaintiff in error to file a petition in error. Jour. 29, p. 18.

1919, September 9.—Petition in error and waiver of summons filed.

1919, September 27.—*To Court*: This cause came on for hearing upon the petition in error, the transcript and the original papers and pleadings from the court below, and was argued by counsel; on consideration whereof the court find that there is no error apparent on the record in said proceedings and judgment. Jour. 29, p. 107.

1919, October 1.—*To Court*: Appeal bond in this case is fixed in the sum of \$200. This day comes the plaintiff in error herein and gives recognizance No. 16316 in the sum of \$200 with  
9 Fred Albers as surety. Jour. 29, p. 119.

1919, October 1.—Petition in error filed in Court of Appeals by plaintiff in error.

[Duly certified.]

*Petition in Error.*

[Filed September 9, 1919.]

The plaintiff in error says that:

On the eighth day of September, A. D. 1919, in the Mayor's Police Court of Garfield Heights, Cuyahoga county, Ohio, in a case then pending therein, wherein the State of Ohio was plaintiff, and he, plaintiff in error, was defendant, a judgment was rendered in favor of the said the State of Ohio and against him, the said Emil Pohl.

A duly certified transcript of the final record, together with the bill of exceptions, are filed herewith and made a part of this petition in error.

The plaintiff in error avers that in said judgment and proceedings in said Mayor's Police Court there is manifest error to his prejudice, to wit:

1. The said court erred in overruling the demurrer of said Emil Pohl to the affidavit and information.
2. The said court erred in overruling the motion of said Emil Pohl to arrest the judgment in said case.
3. The said court erred in overruling the motion of said Emil Pohl for a new trial.
4. The said court erred in imposing sentence and rendering judgment against said Emil Pohl.
5. Other errors apparent on the record.

10 Wherefore the plaintiff in error prays that the said finding and judgment of said Mayor's Police Court may be re-

versed, and that the court make such other order as may be right and proper in the premises.

GEO. B. OKEY,  
HARRY F. WITTENBRINK,  
*Attorneys for Plaintiff in Error.*

*Waiver.*

Cleveland, Ohio, September 9, 1919.

The defendant in error hereby waives the issuance and service of summons in error in the foregoing proceeding and hereby enters its appearance herein.

SAMUEL DOERFLER,  
*Attorney for Defendant in Error.*

11 In the Mayor's Police Court, Garfield Heights, Cuyahoga County, Ohio.

[No. 128.]

THE STATE OF OHIO

vs.

EMIL POHL.

*Transcript.*

September 8, 1919.

This day came Henry Weber, who, being first duly sworn according to law, deposes and says: That on or about the eighth day of September, A. D. 1919, at the county of Cuyahoga, and in the village of Garfield Heights in said county, one Emil Pohl, being then and there a teacher in a certain private or parochial school, conducted in the premises known as corner of Granger road and Turney road, in said village of Garfield Heights, did teach the German language to pupils in said school who had not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools of the State of Ohio, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

(Signed)

HENRY WEBER.

Sworn to before me by the said Henry Weber and by him subscribed in my presence this eighth day of September, A. D. 1919.

(Signed)

JOSEPH A. SCHMITT,  
*Police Justice.*

12 Complaint filed.

Warrant issued to Henry Weber, marshal of said village of Garfield Heights, for the defendant, who made return as follows, to wit:



September 8, 1919.

I took the body of the within named Emil Pohl and have him before the magistrate within named.

(Signed)

HENRY WEBER,  
*Marshal.*

September 8, 1919.—Defendant demurred and filed a written demurrer to the information and affidavit. Argued by counsel. Counsel for defendant filed a written brief in support of said demurrer.

To Court: Demurrer overruled.

To which finding, decision and ruling of the court the defendant, by his counsel, then and there excepted. Exceptions noted.

The defendant, Emil Pohl, being now brought before me to answer said complaint, pleaded not guilty, and in a writing subscribed by him and duly filed waived a jury and submitted to be tried for the offense charged in said complaint, by me.

Having heard the evidence the court finds the said Emil Pohl guilty as charged in the affidavit.

September 8, 1919.—Motion in arrest of judgment filed by defendant.

September 8, 1919.—Motion for a new trial filed by the defendant. Both motions argued by counsel for defendant.

September 8, 1919.—To Court: Motion in arrest of judgment and motion for a new trial overruled; exceptions; exceptions noted.

Defendant ordered to pay a fine to the State of Ohio in the sum of \$25 and the costs of this prosecution.

September 8, 1919.—Defendant gave notice of his intention to apply for leave to file a petition in error.

To Court: Ordered that the said defendant be released on his personal recognizance and that execution of this sentence be suspended until further order.

September 8, 1919.—Defendant presented his bill of exceptions.

To Court: Bill of exceptions allowed, signed and sealed by the court and is made a part of the record of this case, but is not to be recorded or spread at large upon the journal.

September 8, 1919.—Bill of exceptions filed.

[Duly certified.]

*Affidavit.*

[Filed September 8, 1919.]

THE STATE OF OHIO,

*Cuyahoga County, ss:*

Before me, Joseph A. Schmitt, justice of the mayor's police court, Garfield Heights Village, personally came Henry Weber, who, being first duly sworn according to law, deposes and says: That on or about the eighth day of September, A. D. 1919, at the county of Cuyahoga and in the village of Garfield Heights in said county, one

Emil Pohl, being then and there a teacher in a certain private (or parochial) school, conducted in the premises known as corner of Granger and Turney road, in said village of Garfield Heights, did teach the German language to pupils in said school who had not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools of the State of Ohio, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

HENRY WEBER.

Sworn to before me by said Henry Weber and by him subscribed in my presence this eighth day of September, A. D. 1919.

JOSEPH A. SCHMITT,  
*Police Justice.*

*Demurrer.*

[Filed September 8, 1919.]

The said Emil Pohl, defendant, demurs to the information and affidavit because the facts stated therein do not constitute an offense against the laws of the State of Ohio.

GEO. B. OKEY,  
HARRY F. WITTENBRINK,  
*Attorneys for Defendant.*

*Motion in Arrest of Judgment.*

[Filed September 8, 1919.]

Now comes the defendant, Emil Pohl, and moves the court to arrest the judgment in this case for the reason that the facts stated in the information and affidavit do not constitute an offense.

GEO. B. OKEY,  
HARRY F. WITTENBRINK,  
*Attorneys for Defendant.*

15

*Motion for New Trial.*

[Filed September 8, 1919.]

The defendant, Emil Pohl, now comes and moves the court for a new trial in this case for the reasons following, to wit:

1. The finding of conviction is contrary to the evidence.
2. The finding of conviction is contrary to law.
3. Other errors apparent on the record.

GEO. B. OKEY,  
HARRY F. WITTENBRINK,  
*Attorneys for Defendant.*

*Bill of Exceptions.*

[Filed September 8, 1919.]

Be it remembered, that on the eighth day of September, A. D. 1919, this cause came on to be heard before Honorable Joseph A. Schmitt, judge of said court, upon the demurrer of the defendant to the information and affidavit. On consideration whereof the court overruled said demurrer, to which ruling the defendant then and there, by his counsel, at the time excepted and still excepts.

Thereupon, on the same day, the case came on for trial, and the jury being waived, counsel representing the state and the defendant, in open court, entered upon the following stipulation and agreed statement of facts:

"It is hereby stipulated and agreed by and between counsel on behalf of the State and the defendant that a jury be waived and that the case be submitted to the court upon the following agreed facts:

"On the eighth day of September, A. D. 1919, Emil Pohl was a teacher in the parochial school, known as St. John's Evangelical Congregational School and located at the corner of Granger road and Turney road, in the village of Garfield Heights, county of Cuyahoga and State of Ohio, and that on said day he, said Emil Pohl, did impart instruction in and did teach the German language to pupils in said parochial school, who had not completed a course of study equivalent to that prescribed in the first seven grades of

the elementary schools of the State of Ohio; and that said  
17 parochial school is maintained by the voluntary contributions of the pupils and their parents and others interested in the educational purposes of the Evangelical Lutheran Church, but that said school is free, open and available to all persons, without discrimination or distinction, creed, condition, race or otherwise.

"That the said Saint John's Evangelical Lutheran Congregation school being a parochial school and private school does not receive any part of the public school funds of the State of Ohio."

And there was no other evidence offered, introduced or admitted by either the State or defendant in the trial of this case, the foregoing stipulation and agreed statement of facts being all the evidence given or offered by either side upon the trial.

Whereupon, a jury having been waived by the defendant, the court found the defendant guilty, as charged in the information, as appears of record in the case; and the defendant thereafter, within three days, filed a motion in arrest of judgment and a motion to set aside the said finding, judgment and decision and for a new trial, and the same was argued by counsel and submitted to the court, which, upon consideration, overruled the same, as appears of record.

And the defendant thereupon, at the time, excepted to the ruling of the court in overruling motion in arrest of judgment and for a new trial, and still excepts.

And the court thereupon imposed sentence upon the defendant, as appears of record, to which sentence and judgment the defendant thereupon at the time excepted and still excepts.

The defendant thereupon presented this bill of exceptions and prayed that the same be allowed, signed, sealed and filed as a part of the record in said case, but not spread at large upon the journal, according to the statute in such case made and provided, all of which is accordingly done this eighth day of September, A. D. 1919.

[SEAL.]

JOSEPH A. SCHMITT,

*Police Justice.*

19 UNITED STATES OF AMERICA, ss:

Supreme Court of Ohio.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the Seal of said Supreme Court of Ohio, in the City of Columbus, this 19th day of September, A. D. 1921.

[Seal of the Supreme Court of the State of Ohio.]

W. C. LAWRENCE,

*Clerk of the Supreme Court of Ohio.*

20

16492.

In the Supreme Court of Ohio.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Petition of Emil Pohl for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.*

To the Honorable C. T. Marshall, Chief Justice of the Supreme Court of the State of Ohio:

Emil Pohl, Plaintiff in Error in the above entitled cause, shows by this Petition to this Honorable Court, that in the records, proceedings and decisions in the Supreme Court of the State of Ohio, the same being the highest court of said State in which a decision could be had in this suit, manifest error has occurred, greatly to the damage of said Emil Pohl.

That, as appears in the record and proceedings, there was drawn in question the validity of an Act of the General Assembly of the State of Ohio, passed May 8, 1919, and approved by the Governor, June 5, 1919, entitled:

"An Act

To supplement section 7762 of the General Code by the addition of supplemental sections, to be known as sections 7762-1, 7762-2, 7762-3, and 7762-4, and to repeal section 7729, concerning elementary, private, and parochial schools, and providing that instruction shall be in the English language."

Said Emil Pohl further says that in this cause, on the 7th day of June, 1921, final judgment was rendered against him by the Supreme Court of the State of Ohio, that being the highest court of law in said State of Ohio, wherein it was adjudged that the Court of Appeals of Cuyahoga County, Ohio, did not err in its judgment affirming the judgment of the Court of Common Pleas of Cuyahoga county, Ohio, which latter Court affirmed the judgment of the Mayor's Police Court of Garfield Heights, Cuyahoga county, Ohio, and held that said Mayor's Police Court did not err at the trial of said cause in said court in sustaining the validity of said Act; and said Supreme Court of the State of Ohio therein affirmed the judgment of said Court of Appeals and said lower courts; and in said cause further adjudged that said Act of the General Assembly of the State of Ohio was a valid law, and the conviction of said Emil Pohl thereunder was not repugnant to Section 1 of Art. XIV, being the Fourteenth Amendment to the Constitution of the United States, which ordains:

\* \* \* "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

All of which, to the prejudice of said Emil Pohl fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith.

Wherefore your petitioner prays for an allowance of a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio and the Judges thereof, to the end that the record in this case may be removed into the Supreme Court of the United States and the errors complained of by your petitioner may be examined and corrected and said judgment reversed, and said cause remanded, as provided by law; and that your petitioner may have such other and further relief in the premises as may be adjudged; and your petitioner will ever pray.

(Signed)

EMIL POHL,

By TIMOTHY S. HOGAN AND  
GEO. B. OKEY,

*His Attorneys.*

The Writ of Error as prayed in the foregoing Petition is hereby allowed this 29th day of August, 1921.

Dated at the City of Columbus, Ohio, this 29<sup>th</sup> day of August, 1921.

C. T. MARSHALL,  
*Chief Justice of the Supreme Court  
of the State of Ohio.*

21½ [Endorsed:] 16492. Filed Aug. 29, 1921. Supreme Court of Ohio. W. C. Lawrence, Clerk.

22 In the Supreme Court of Ohio.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.*

On this 29th day of August, 1921, the application of Emil Pohl, Plaintiff in Error and the State of Ohio, Defendant in Error, for a Writ of Error, came on to be heard, and it appearing to the Court from the Petition filed herein and from the record and the proceedings filed therewith that said application should be granted, and that a transcript of the record, proceedings and papers, upon which the judgment of the Court was rendered, properly certified, should be sent to the Supreme Court of the United States in accordance with the prayer of said Petition in order that such proceedings may be had as may be just and proper:

Now, therefore, it is ordered that the Writ of Error be allowed, and that a true copy of the record, Assignment of Errors, and all proceedings in the case of the Supreme Court of the State of Ohio shall be transmitted to the Supreme Court of the United States duly certified according to law, in order that said Court may inspect the same and take such action therein as it deems proper according to law.

C. T. MARSHALL,  
*Chief Justice of the Supreme Court  
of the State of Ohio.*

Journal 28, page 694.

22½ [Endorsed:] 16492. Filed Aug. 29, 1921. Supreme Court of Ohio. W. C. Lawrence, Clerk.

23 In the Supreme Court of Ohio.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.*

Now comes Emil Pohl in connection with his petition for a Writ of Error herein, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Ohio in the above entitled case, there is manifest error in this to-wit:

First. The Supreme Court of the State of Ohio erred in affirming the judgment of the Court of Appeals of Cuyahoga county, Ohio, and in refusing to reverse said judgment and remand the cause to the Court of Appeals of Cuyahoga county, Ohio, for further proceedings.

Second. The Supreme Court of the State of Ohio should have found that said Court of Appeals of Cuyahoga county, Ohio, erred in affirming the judgment of the Court of Common Pleas of Cuyahoga county, Ohio, affirming the judgment of the Mayor's Police Court of Garfield Heights, Cuyahoga county, Ohio, convicting said Emil Pohl with having violated an Act of the General Assembly of the State of Ohio passed May 8, 1919, approved June 5, 1919, entitled:

"An Act

24 To supplement section 7762 of the General Code by the addition of supplemental sections, to be known as sections 7762-1, 7762-2, 7762-3, and 7762-4, and to repeal section 7729, concerning elementary, private, and parochial schools, and providing that instruction shall be in the English language."

Third. The judgment of the said Supreme Court of Ohio was given for said State of Ohio when it should have been given in favor of said Emil Pohl.

Fourth. The judgment of the Supreme Court of the State of Ohio, in this case, is in contravention of Section 1 of Art. XIV, being the Fourteenth Amendment to the Constitution of the United States, which declares:

\* \* \* "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth. The Supreme Court of the State of Ohio erred in holding that the Act of the General Assembly of the State of Ohio passed May 8, 1919, approved June 5, 1919, entitled:

"An Act

To supplement section 7762 of the General Code by the addition of supplemental sections, to be known as sections 7762-1, 7762-2, 7762-3, and 7762-4, and to repeal section 7729, concerning elementary, private, and parochial schools, and providing that instruction shall be in the English language,"

was not in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States, notwithstanding said Act, and the conviction of said Emil Pohl thereunder, assumes to deprive and to deny to said Emil Pohl the privilege and immunity as a citizen of the United States, and of his liberty as such citizen, without due process of law, to instruct pupils in the German Language, in private and parochial schools, who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of the State of Ohio.

TIMOTHY S. HOGAN,

GEO. B. OKEY,

*Attorneys for Emil Pohl.*

24½ [Endorsed:] 16492. In the Supreme Court of Ohio.  
Emil Pohl, Plaintiff in error vs. The State of Ohio, Defendant in error. Assignment of errors. Filed Aug. 29 1921.  
Supreme Court of Ohio, W. C. Lawrence, Clerk.

25 In the Supreme Court of Ohio.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Writ of Error from the Supreme Court of the United States to the  
Supreme Court of the State of Ohio.*

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Whereas, in the record and proceedings and in the rendition of the judgment in the above entitled cause which is now before you, or some of you, between Emil Pohl, Plaintiff in Error, and the



State of Ohio, Defendant in Error, your court being the highest court of said State of Ohio having jurisdiction of the cause, there was drawn in question the validity of a statute of the State of Ohio and an authority exercised under said statute, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity; and whereas there is manifest error in said judgment to the great damage of said Emil Pohl; and whereas we are willing that if there is error it should be duly corrected, we command you therefore, if judgment be given therein, that you send under seal of your court the record and proceedings in said cause to the Supreme Court of the United States together with this Writ, within such time as may be necessary, in order that you may have the same at Washington on the 5th day of 26 October, 1921, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid may be then inspected by the Supreme Court of the United States and that said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

(Witness) the Honorable William H. Taft Chief Justice of the Supreme Court of the United States, this 5 day of September, A. D. 1921.

[Seal of the United States District Court, Southern Dis.  
of Ohio.]

B. E. DILLEY,  
*Clerk of the United States District  
Court for the Southern District of  
Ohio, Eastern Division.*

Allowed

C. T. MARSHALL,  
*Chief Justice of the  
Supreme Court of Ohio.*

26½ [Endorsed:] Filed Sep. 5, 1921. Supreme Court of  
Ohio, W. C. Lawrence, Clerk.

27 In the Supreme Court of the United States.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Citation.*

THE UNITED STATES OF AMERICA, ss:

To Honorable John G. Price, Attorney General of the State of Ohio,  
and to Honorable Edward C. Stanton, Prosecuting Attorney of  
Cuyahoga County, Ohio, Greetings:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington in the District of Columbia, on the — day of —, A. D. 1921, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Ohio from a final judgment signed, filed and entered therein on the 7th day of June, 1921, in a proceeding therein pending wherein Emil Pohl is Plaintiff in Error and the State of Ohio is Defendant in Error, to show cause if any there be why the judgment rendered against said Emil Pohl as in said Writ of Error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

C. T. MARSHALL,

*Chief Justice of the Supreme Court  
of the State of Ohio.*

Dated this 29<sup>th</sup> day of August, 1921.

Copy of the above Citation received this 2nd day of September, 1921, at Columbus, Ohio, and the appearance of the State of Ohio is hereby entered.

\_\_\_\_\_  
*Attorney General of the State of Ohio.*

EDWARD C. STANTON,

*Prosecuting Attorney of Cuyahoga County, Ohio.*

27½ [Endorsed:] Filed Sep. 19, 1921, Supreme Court of Ohio.  
W. C. Lawrence, Clerk.

28

In the Supreme Court of the United States.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Stipulation as to Transcript of Record.*

Columbus, Ohio, August 31st, 1921.

The undersigned counsel for the respective parties in this cause hereby stipulate that the Clerk of the Supreme Court shall make a transcript of, and shall certify and transmit the entire record in this cause, including all pleadings, opinions and proceeding- in this court and a certified copy of the docket and journal entries in this court.

TIMOTHY S. HOGAN,

GEO. B. OKEY,

*Attorneys for Emil Pohl.**Attorney General of Ohio.*

EDWARD C. STANTON,

*Prosecuting Attorney of Cuyahoga County, Ohio.*

EDWARD J. THOBABEN,

*Asst. Pros. Attorney.*

28½

[Endorsed:] Filed Sep. 19, 1921, Supreme Court of Ohio.  
W. C. Lawrence, Clerk.

29

#17492.

Know all men by these presents, That we Emil Pohl, as principal, and Royal Indemnity Co. of New York, as sureties, are held and firmly bound unto The State of Ohio in the full and just sum of two hundred and fifty (\$250.00) dollars, to be paid to the said obligee and its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of September, in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, lately at the January, 1921, term of the Supreme Court of the State of Ohio in a suit depending in said court, between Emil Pohl, plaintiff-in-error, and the State of Ohio, Defendant-in-error, a judgment was rendered against the said Emil Pohl, and the said Emil Pohl having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the afore-said suit, and a citation directed to the said Honorable John G. Price, Attorney General of the State of Ohio, and to Honorable Edward C. Stanton, Prosecuting Attorney of Cuyahoga County, Ohio, citing and

admonishing them to be and appear at the Supreme Court of the United States, at Washington, with- — days from the date thereof.

Now, the condition of the above obligation is such, That if the said Emil Pohl shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

EMIL POHL.	[SEAL.]
ROYAL INDEMNITY CO.	[SEAL.]
L. J. O'DONNELL.	[SEAL.]

Sealed and delivered in presence of  
EDWARD P. HOGAN.  
T. S. HOGAN.

Approved by  
C. T. MARSHALL,  
*Chief Justice of the Supreme Court  
of the State of Ohio.*

29½ [Endorsed:] 17492. Application made Sept. 7th, 1921.  
C. T. Marshall, Chief Justice. Emil Pohl vs. State of Ohio.  
Copy of Bond. Filed Sep. 8, 1921, Supreme Court of Ohio. W. C. Lawrence, Clerk.

30 Supreme Court of the State of Ohio, January Term, A. D.  
1919.

(Minute Book No. 35, Page 292.)

Number: 16492.

Title of Case.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

Action: Error to the Court of Appeals of Cuyahoga County.

Attorneys: Harry F. Wittenbrink, Cleveland; George B. Okey,  
T. S. Hogan, Columbus, Ohio, for plaintiff in error.

John G. Price, Attorney General, Columbus, Ohio; E. C. Stanton,  
Prosecuting Attorney, R. A. Baskin, F. J. Merrick, Cleveland, Ohio,  
for defendant in error.

*Transcript of Docket Entries, Memoranda of Pleadings, &c., Filed, Writs Issued, Judgments, Orders and Decrees.*

• 1920.

- Jan. 8. Petition in Error and Waiver of Summons filed.  
 " " Court of Appeals transcript, original papers and bill of exceptions filed.  
 " " Papers taken by Toothaker & Rodenfels. 1.29/20—Returned.  
 " 21. Printed Record (12) filed; 1/22/20—Proof of service filed.  
 Mar. 9. Entry for extension of time to file brief, filed.  
 " " \* \* \* Order extending time for Plaintiff's Printed Briefs to May 17, 1920—by consent. H. L. Nichols, C. J.  
     Journal 28, page 392.  
 May 15. Consent entry extending time to file briefs, filed.  
 " " \* \* \* Order extending time for plaintiff's briefs to July 1, 1920. Nichols, C. J.,  
     Journal 28, page 429.  
 Jun. 30. Plaintiff's printed briefs filed. 7/1/20—Proof of service filed.  
 Dec. 17. Defendant's printed briefs filed. 12/20/20—Proof of service filed.

1921.

- Feb. 23. Plaintiff's Printed Reply Briefs filed.  
 Jun. 7. \* \* \* Judgment Affirmed.  
     Journal 28, page 646.  
 Jun. 14. Mandate Issued.  
 " " Original papers sent to Clerk.  
 Aug. 29. Petition for writ of error from Supreme Court of United States to Supreme Court of Ohio, filed.  
 " " Assignment of Errors and an order of allowance by Chief Justice.  
 " " C. T. Marshall, filed.  
 Aug. 29. \* \* \* Order allowing writ of error. C. T. Marshall, C. J.  
     Journal 28, page —.  
 Sep. 5. Writ of Error filed.  
 " " Petition for writ, Assignment of errors and writ of error taken by Hogan and Hogan.  
 " 8. Bond on writ of error with Royal Indemnity Company of New York, as surety, filed.  
 " 19. Stipulation as to transcript of record filed,  
 " " Citation and entry of appearance of defendant filed.

*Transcript of Journal Entries.*

No. 16492.

EMIL POHL

vs.

THE STATE OF OHIO.

1920.

March 9. "On application, the time within which the plaintiff in error is required to file his printed brief or argument herein is hereby extended until the 17th day of May, 1920.

Approved:

HUGH L. NICHOLS,  
*Chief Justice.*"

Journal 28, page 392.

May 18. "On application, the time for filing brief of the plaintiff in error herein is extended to the first day of July, 1920.

Approved:

HUGH L. NICHOLS,  
*Chief Justice.*"

Journal 28, page 429.

1921.

June 7. "This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be and the same is hereby affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at \$—. Ordered, That a special mandate be sent to the Common Pleas Court of Cuyahoga County, to carry this judgment into execution. Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, "for entry."

Journal 28, page 646.

(Nos. 16492 and 16493—Decided June 7, 1921.)

POHL

v.

THE STATE OF OHIO.

BOHNING

v.

THE STATE OF OHIO.

*Constitutional Law—Compulsory Education—Teaching by English Language Only—Sections 7762-1 and 7762-2, General Code—German Language Prohibited, When—Public, Private and Parochial Schools.*

Error to the Court of Appeals of Cuyahoga County.

The plaintiff in error in each of the above entitled causes was convicted and sentenced to pay a fine of twenty-five dollars and costs in the mayor's police court of the village of Garfield Heights, Cuyahoga county, Ohio, Emil Pohl, having been a teacher, and H. H. Bohning, a member of the board of trustees, of a certain parochial school, known as St. John's Evangelical Lutheran Congregational School, in the village of Garfield Heights, it appearing that Pohl did on the 8th day of September, 1919, in said village, impart instructions in and teach the German language to pupils in such school who had not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools of the state of Ohio, and that Bohning, as a member of the board of trustees of such school, did cause Pohl to impart instruction and teaching as aforesaid, contrary to the provisions of Sections 7762-1, 7762-2 and 7762-3, General Code. Error was prosecuted to the common pleas court, where the judgment of the mayor's court was affirmed; error prosecuted to the court of appeals, where the judgments of the common pleas court and the mayor's court were affirmed; and error prosecuted here to the judgments of the courts below, the only question here made being as to the constitutionality of the sections of the Code above referred to.

Mr. Harry F. Wittenbrink; Mr. George B. Okey and Mr. Timothy S. Hogan, for plaintiffs in error.

33 Mr. John G. Price, attorney general; Mr. R. A. Baskin, prosecuting attorney; and Mr. Frank J. Merrick, assistant prosecuting attorney, for defendant in error.

## By the COURT:

While much consideration in arguments and briefs has been given to the wisdom of the provisions of Sections 7762-1 and 7762-2, General Code, this court is of opinion that such argument might better be addressed to the legislative branch of the government.

Courts do not sit to review the wisdom of legislative acts, nor do they possess such power. On the contrary, the policy, the advisability, and the wisdom of all legislation, subject to the veto of the governor and the referendum of the people, are subjects for legislative determination exclusively. The inexpediency, injustice or impropriety of a legislative act are not grounds upon which the court may declare the act void. The remedy for such evils must be sought by an appeal to the justice and patriotism of the legislature itself.

Except as limited by the Federal and State Constitutions, the power of the general assembly to legislate is inherent and unlimited and covers the whole range of legitimate legislation.

If the general assembly in the exercise of its power to legislate enacts laws necessary for the welfare of society, and thereby makes unlawful conduct theretofore lawful, such legislation will not be held to be unconstitutional simply because it forbids the doing of things theretofore permitted. The enjoying and defending life and liberty and seeking and obtaining happiness do not contemplate that they shall be enjoyed, sought and obtained as they were enjoyed, sought and obtained by primitive man, but that they shall be enjoyed, sought and obtained with such regard to the rights of society as the common welfare, as defined by the legislature, requires. It is upon this theory that our system of government exists.

The legislation in question is of equal application to every pupil of the state who has not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools, regardless of nationality, ancestry, or place of birth, and is, therefore, of equal operation upon every person within the designated grade.

The constitutionality of the act under consideration is, therefore, dependent upon whether the common welfare required such legislation. The legislature is presumed to have had before it such information with reference to the effect of the teaching of the German language to the youth of the state below the eighth grade as justified it in concluding that the common welfare required the prohibition of such teaching to such youth, and if the legislature found such facts to exist as to warrant it in the enactment of the sections in question it is not within the province of a court to redetermine the existence or nonexistence of such facts, even though the court might upon such redetermination reach a different conclusion. If under any possible state of facts the sections would be constitutional, this court is bound to presume that such facts exist.

No principle is better established by the decisions of the federal and state courts than that the possession and enjoyment of all rights are subject to such reasonable regulations as are deemed by the legislative authority to be essential to the welfare of the state, and



every intendment is to be made in favor of the validity and lawfulness of such regulations unless they are clearly unreasonable and violative of some express provision of the constitution.

For these reasons we are unable to reach the conclusion that Sections 7762-1 and 7762-2 are unconstitutional, and the judgment of the court of appeals will, therefore, be affirmed.

Judgment affirmed.

Marshall, C. J., Johnson, Hough, Wanamaker, Robinson, Jones and Matthias, JJ., concur.

35      STATE OF OHIO,  
            *City of Columbus:*

Supreme Court of the State of Ohio, of the Term of January, A. D., 1921.

I, J. L. W. Henney, Reporter of the Supreme Court of Ohio, do hereby certify that the foregoing transcript, consisting of three (3) pages, constitutes a full, true and correct copy of the per curiam opinion of the Supreme Court of Ohio (concurred in by Marshall, C. J., Johnson, Hough, Wanamaker, Robinson, Jones and Matthias, JJ.), in Cause No. 16492, Pohl v. The State of Ohio, as the originals thereof appear on file and of record in this office, as of the date of this certificate.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 29th day of August, A. D., 1921.

[Seal of the Supreme Court of the State of Ohio.]

J. L. W. HENNEY,  
                    *Reporter.*

[Endorsed:] 16492. Supreme Court of Ohio. Filed Aug. 29, 1921. W. C. Lawrence, Clerk.

36                      *Certificate of Lodgment.*

STATE OF OHIO, ss.:

Supreme Court.

I, Wilbur C. Lawrence, Clerk of the said Court, do hereby certify that there was lodged with me as said Clerk, on the date set forth below, in the case of Emil Pohl, Plaintiff in Error vs. The State of Ohio, Defendant in Error,

1. Two copies of the writ of error, as herein set forth, one for the defendant in error and one to file in my office, the same being lodged with me on August 29th, 1921.

2. The original bond, a copy of which is herein set forth, the same being lodged with me on September 7th, 1921, and presented

to the Chief Justice, Hon. C. T. Marshall on that date, and returned and filed in my office on September 8th, 1921.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court at my office in Columbus, Ohio, this 19th day of September, A. D. 1921.

[Seal of the Supreme Court of the State of Ohio.]

W. C. LAWRENCE,  
*Clerk of the Supreme Court of Ohio.*

37

Supreme Court of the State of Ohio.

No. 16492.

EMIL POHL, Plaintiff in Error,

vs.

THE STATE OF OHIO, Defendant in Error.

*Authentication of Record.*

THE STATE OF OHIO,  
*City of Columbus, ss:*

I, Wilbur C. Lawrence, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, writ of error, citation to defendant and entry of appearance, and stipulation as to transcript of record are the original papers filed in this Court in the above entitled cause; that the foregoing copy of the bond is a true copy of the bond filed in said cause; that the printed copy of the record attached hereto is a true copy of the printed record filed in said cause; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the Records of said Court, and that a duly certified copy of the opinion of the Supreme Court of Ohio is hereto attached.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio this 19th day of September, A. D. 1921.

[Seal of the Supreme Court of the State of Ohio.]

W. C. LAWRENCE,  
*Clerk of the Supreme Court of Ohio.*

Endorsed on cover: File No. 28,517. Ohio Supreme Court. Term No. 562. Emil Pohl, plaintiff in error, vs. The State of Ohio. Filed October 1st, 1921. File No. 28,517.

FILED  
SEP 19 1922

W. S. STANLEY  
CLERK

# United States Supreme Court

H. E. Bohling,  
Plaintiff in Error,  
vs.  
The State of Ohio,  
Defendant in Error.

[No. 181]

Emil Pohl,  
Plaintiff in Error,  
vs.  
The State of Ohio,  
Defendant in Error.

[No. 182]

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR

TIMOTHY S. HOGAN and

FRANK DAVIS JR.

Attorneys for Plaintiffs in Error

ROOTHMAN & ROTHMIRE LAW FIRM, CHICAGO, ILL.

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# United States Supreme Court.

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H. H. Bohning, Plaintiff in Error, vs. The State of Ohio, Defendant in Error.	}	[No. 561.]
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Emil Pohl, Plaintiff in Error, vs. The State of Ohio, Defendant in Error.	}	[No. 562.]
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## BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

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### STATEMENT OF FACTS.

The plaintiffs in error were convicted and sentenced to pay a fine of \$25.00 each, in the mayor's court of the village of Garfield Heights, Cuyahoga county, Ohio, Pohl having been a teacher and Bohning a member of the board of trustees of a certain parochial school, known as St. John's Evangelical Congregational School, in said village, it appearing that Pohl did, in said school, on the

eighth day of September, 1919, impart instruction in and did teach the German language to pupils in said parochial school who had not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools of the State of Ohio, and that Bohning, as a member of said board of trustees, did cause said Pohl to impart instruction and teach, as aforesaid, contrary to the provisions of what is known as the "Ake Law."

It was stipulated in an agreed statement of facts upon the trial that:

"Said parochial school is maintained by the voluntary contributions of the pupils and their parents, and others interested in the educational purposes of the Evangelical Lutheran Church, but that said school is free, open and available to all persons, without discrimination or distinction, creed, condition, race or otherwise.

"That the said Saint John's Evangelical Lutheran Congregational School, being a parochial and private school, does not receive any part of the public school funds of the State of Ohio."

The convictions were affirmed in the Common Pleas Court, the Court of Appeals and the Supreme Court of Ohio, in which courts proceedings in error were successfully prosecuted.

The following is a copy of the statute in question, commonly known, from the name of its author, as the "Ake Law." (108 Ohio Laws, 614.)

"An act to supplement section 7762 of the General Code, by the addition of supplemental sections to be known as sections 7762-1, 7762-2, 7762-3 and

7762-4, and to repeal section 7729, concerning elementary, private and parochial schools and providing that instruction shall be in the English language.

**"Be it enacted by the General Assembly of the State of Ohio:**

**"Section 1.** That section 7762 be supplemented by sections 7762-1, 7762-2, 7762-3 and 7762-4 to read as follows:

**"Sec. 7762-1.** That all subjects and branches taught in the elementary schools of the state of Ohio below the eighth grade shall be taught in the English language only. The board of education, trustees, directors and such other officers as may be in control, shall cause to be taught in the elementary schools all the branches named in section 7648 of the General Code. Provided, that the German language shall not be taught below the eighth grade in any of the elementary schools of this state.

**"Sec. 7762-2.** All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state, which instruct pupils who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of this state, shall be taught in the English language only, and the person or persons, trustees or officers in control shall cause to be taught in them such branches of learning as prescribed in section 7648 of the General Code, or such as the advancement of pupils may require, and the persons or officers in control direct; provided that the German language shall not be taught below the eighth grade in any such schools within this state.

**"Sec. 7762-3.** Any person or persons violating the provisions of this act shall be guilty of a misdemeanor and shall be fined in any sum not less than twenty-five dollars nor more than one hundred dol-



lars, and each separate day in which such act shall be violated shall constitute a separate offense.

“Sec. 7762-4. In case any section or sections of this act shall be held to be unconstitutional by the supreme court of Ohio, such decision shall not affect the validity of the remaining sections.

“Section 2. That section 7729 of the General Code be and the same is hereby repealed.”

Passed May 8, 1919.

Approved June 5, 1919.

### ARGUMENT.

The only question in the case is whether or not Sections 7762-2 and 7762-3 of the act are in contravention of that portion of the Fourteenth Amendment to the Constitution of the United States, which provides:

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

It is the contention of the plaintiffs in error that Sections 7762-2 and 7762-3 of the act in question are in contravention of the Fourteenth Amendment in that:

1. They abridge their privileges and immunities as citizens of the United States.
2. They deprive them of liberty without due process of law.
3. They deny to them the equal protection of the laws.

It is, of course, well settled that the Fourteenth Amendment does not limit the subjects upon which the police power of a state may lawfully be exerted.

Upon that proposition, Chief Justice Fuller, in the case of **Giozza vs. Tierman**, 148 U. S., 657, 662, said:

“It was not designed to interfere with the power of the state to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order.”

But, in the exercise of the police power, the constitutional guaranties may not be ruthlessly and arbitrarily stricken down and overridden. To disregard them the public necessity must be imperative.

Speaking of the police power, Mr. Justice McKenna, in the case of **Eubank vs. City of Richmond**, 226 U. S., 137, 143, observed:

“But necessarily it has its limits and must stop when it encounters the prohibitions of the constitution.”

Discussing the police power in connection with the constitutional guaranties, the noted Judge Christiancy, in the case of **People vs. Jackson & Michigan Plank Road Co.**, 9 Mich., 285, 307, said:

“Powers, the exercise of which can only be justified on this specific ground, and which would otherwise be clearly prohibited by the constitution, can be such only as are so clearly necessary to the safety, comfort or well being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion that the framers of the constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case notwithstanding the language of the prohibition would otherwise include it.”

We assume that it will not seriously be denied that the letter of Section 7762-2 of the “Ake Law” contravenes the inhibitions of the Fourteenth Amendment relating to liberty, equality and privilege, and that it will be claimed, as it was below, that the same was passed by the General Assembly in pursuance of a proper exercise

of the police power in the interest of the public welfare, under circumstances which at the time justified and still continues to justify the manifest disregard of constitutional guaranties, safeguards and inhibitions.

The section, fairly construed, by the use of the phrase, "or such as the advancement of pupils may require," means that the persons and officials in control of a private parochial school may, in their discretion, permit and direct the teaching of any foreign language to pupils therein who have not completed a course of study equivalent to that prescribed (Section 7648, General Code) for the first seven grades of the elementary schools of the state, excepting always the German language, the teaching of which is prohibited.

It was the conception of the court below (*Pohl vs. The State of Ohio*, 102 Ohio St., 474, 477), that the discretion of the legislative body of the state to declare acts and things *malum prohibitum* which were not, before the enactment, inherently wrongful or immoral, is beyond review by the courts for, in its *per curiam* opinion it declares that "it is not within the province of a court to re-determine the existence or non-existence of such facts," referring to facts which, in the opinion of the legislative body "justified it in concluding that the common welfare required" the enactment.

If such be the law, we have at last arrived at the construction so long contended for by the extreme socialists that the constitutional guaranties of life, liberty and property are mere governmental promises to be regarded and kept or not as the legislative branch may conclusively determine.

But we have not yet reached that point in the processes of evolution supposed to be going on in constitutional conception and construction. The ultimate power of the courts to inquire into and determine the existence of the necessity for the exercise of the police power still lives. They still, independently of the legislative branch, have a judgment of their own.

It was held in the case of **Eubank vs. City of Richmond**, 226 U. S., 137:

“While the police power of the state extends not only to regulations promoting public health, morals and safety, but also to those promoting public convenience and general prosperity, it has its limits and must stop when it encounters the prohibitions of the Federal Constitution.”

It was said by Mr. Justice Brown in the case of **Lawton vs. Steele**, 152 U. S., 133, 137:

“The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts.”

It was well said by Judge Davis, in the case of **State vs. Boone**, 84 Ohio St., 346, 351:

“While, therefore a broad discretion is given to the legislature to provide for the general welfare, it necessarily is not an arbitrary or unlimited discretion; for if it were beyond judicial control or review it would amount to a practical abrogation of all constitutional guaranties of personal rights and the undefined boundaries of legislative power

could be extended so as to authorize the worst and most irresponsible form of despotism, a legislative despotism conducted in the name of the people. Hence it has been held, not only in this state, but in a great number of cases both in the federal and state courts, that it is within the judicial power to declare void an unnecessary or unreasonable exercise of police power."

Mr. Justice Peckham, in the case of **Lochner vs. New York**, 198 U. S., 45, 56, said:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty."

Speaking of the police power, Mr. Justice Day, in the case of **Buchanan vs. Warley**, 245 U. S., 60, 74, said:

"The exercise of this power, embracing nearly all legislation of a local character, is not to be in-

terfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution."

The rule was thus defined by this court in the case of **Rast vs. Van Deman**, 240 U. S., 343:

"The recognized rule that legislative opinion may not impose judicial opinion as to what are fundamental rights, does not determine supremacy in any given instance; but the power of the legislature to regulate conduct and contracts upon its conception of the public welfare is only subject to review by the courts when the legislation is **unreasonable or purely arbitrary.**"

The legislative branch, then, is not the sole judge of the reality of the public necessity which justifies its action in the exercise of the police power. In the last analysis, the courts are the final arbiters of that necessity which must form the predicate of the deprivation of the solemn rights of citizens guaranteed by the primordial law of the land, violation of which, by the states, are inhibited by the Fourteenth Amendment. That Amendment was intended to prevent arbitrary, undue, unjust and capricious interference or deprivation of those personal rights. The test of a police regulation, measured by the Amendment is reasonableness, as contradistinguished from arbitrary or capricious action.

Proceeding to test Sections 7762-2 and 7762-3 of the act in question by the established rule, the inquiry arises:

Was the public necessity upon which it was based real, or was it assumed and pretended? Did it actually exist?

That public necessity, from the legislative viewpoint, may best be stated by reference to the following excerpts from the message of Governor James M. Cox to the General Assembly urging a change in the pending bill, which, as it stood, applied only to the public schools. Vol. 108, Ohio Senate Journal (1919), page 1238.

"I am thoroughly convinced that the action of the House was taken through an entire misconception as to the meaning of the bill. First of all, it carries a very practical objection in that it will interfere with established routine in the junior high schools which are considered part of the grades. But it is not this phase of the matter which prompts my addressing your honorable body.

"The language employed, the closer it is analyzed, is artful, insidious, and apparently deliberate in its attempt to deceive the people of the state. Stripped of its verbiage, it means this: That only a part of the children of Ohio, during the impressionable years, when they pass through the elementary grades, are protected from the possibility of poison from German virus. The private and parochial schools of this state have not asked the preference which this bill provides, and they would in due season, resent the implication which it carries. We do not want a preserve of treason anywhere in Ohio, and to create one through legislative act would be a reproach against the fair name of this state.

"It is not necessary for me to elaborate on the resolute, composite thought of our people. We have paid bitterly for delinquencies in the past, and the first precaution that suggests itself to the patriotic mind with the early days of peace, is to destroy every agency of German propaganda, and see to it that none can be created in the future.



"This bill presumably is based upon the idea that the teaching of German to the tender youth of the state is a menace to the ideals of this Republic, and yet it protects only the children in the public schools. It would be unwarranted and even wicked presumption that children in private and parochial schools are not American. They are part of our younger generation, deserving of every guarantee and safety which the common schools provide. The naked truth is that the ingenious phrase of this bill springs from disloyalty somewhere. Someone seeks to create a sheltered spot where treason can grow under cover of the law.

"Those in whom this disloyal interest is centered, would form but a mere infinitesimal part of the private and parochial schools, but their entrance would be under circumstances unworthy of the very institutions which their sponsors ostensibly honor. We have only to cast an eye and ear to what is going on in other states to be thoroughly convinced that the Prussian spirit of intrigue is not dead in America, and it must be more than a mere coincidence that the attempt elsewhere is made through statutory phrase much, if not quite the same as that contained in the measure under discussion.

"I counsel with you through this message, rather than await the exercise of the veto privilege, because I am convinced that upon reflection you will not want the history of these reconstruction days to carry the record of a legislative enactment based upon treason and passed through deception. I am sure that in the final analysis both the legislative and executive thought of this state is agreed that neither our people, nor our governmental agencies, will be trifled with.

"If any person in Ohio wants his child indoctrinated with Prussian creed, let our safeguards be such that he must go elsewhere for it."

The bill, in accordance with the message, was so amended as to include private and parochial schools, and passed in that form. It went into effect on the fifth day of September, 1919. The last gun in the great World War had been fired almost ten months before, the armistice with Germany having been signed on the 11th day of November, 1918. On the same date the President delivered a message to Congress in which, after reading the full terms of the armistice, he said:

“The war thus comes to an end; for having accepted these terms of armistice, it will be impossible for the German command to renew it.”

A little further he said:

“We know only that this tragical war \* \* \* is at an end.”

Hence it cannot be claimed that the legislation in question was necessary as a war measure. Indeed, so far as the United States was concerned, the war itself was waged not so much against the German people as against the Imperial German Government. Such was the declaration of Congress in the joint resolution passed April 6, 1917, in which it was said:

“That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared.”

In his address requesting the adoption of the resolution, the President said:

“We have no quarrel with the German people. We have no feeling toward them but one of sympathy

and friendship. It was not upon their impulse that the government acted in entering the war. It was not with their previous knowledge and approval. . . . We are, let me say again, the sincere friends of the German people, and shall desire nothing so much as the early re-establishment of intimate relations of mutual advantage between us."

So that the "Ake Law" must rest, not upon the extraordinary powers recognized to exist in every government during actual and existing conditions of war, but upon the naked police power, the exercise of which becomes necessary for the public safeguard and welfare, in time of peace.

The predicate that there was a "poison virus" in the German language and that a private or parochial school in which that language was taught was a "preserve of treason" was without the slightest foundation in fact. That there was a public necessity for the extirpation of all knowledge of the German language, by prohibiting the teaching thereof, in order "to destroy every agency of German propaganda" was an assumption that lacked every element of truth and common sense. The best that can be said of the act is that it was a strained reflex of war phobia, passed after the war was over. If hate is justified in the vortex of war, public necessity does not demand that it find expression in the form of a statutory enactment after the event.

If there was a further assumption that residents of Ohio, of German nativity and descent, were extensively members of Red organizations, advocating Bolshevist theories and doctrines, hostile to our institutions, and that

the extirpation of the German language would tend to repress and disrupt such organizations, that also lacks the element of truth. Those organizations are composed of foreign constituents of recent immigration, of which the German people in this country form no part and with which they have neither racial affiliation nor doctrinal sympathy. The fact is that immigration of persons having Germany as the country of their origin, during the past twenty years, has been slight indeed, when compared with that from other countries. From 1900 to 1910, the German immigration was but 3.9 per cent. of the whole immigration to this country. From 1910 to 1919, it was 2.7 per cent. During the same period the immigration from Russia was five times as great. That from Italy was greater still, and that from Austria-Hungary, chiefly Hungarians, was the largest of all. The total German immigration to this country since 1899 has been 484,422, of which it is not likely that as many as 5000 form a part of the six millions of Ohio's population. From 1850 to 1890, our immigration was chiefly, and in almost equal parts, from the United Kingdom of England and from Germany. In the decade from 1850 to 1860 the German immigration was 36.6 per cent. of the whole. From 1860 to 1870 it was 34 per cent. From 1870 to 1880 it was 25 per cent. From 1880 to 1890 it was 27.7 per cent. From 1890 to 1900 it was 14 per cent. Thereafter, as we have seen, it fell off very rapidly, until, after 1900 it was less than 3 per cent. of the total immigration. The remarkable decrease in the proportion of immigrants from Northwestern Europe and a striking

increase in the proportion from Southern and Eastern Europe form conspicuous features of immigration statistics of recent years. For the decade between the taking of the censuses of 1900 and 1910, the total immigration was about 8,500,000. Of this total, about 6,800,000, or 72 per cent. was from Southern and Eastern Europe, and about 1,800,000, or 21 per cent., from Northwestern Europe. In the 100 years since our country began to keep records of immigration, 5,500,000 Germans, leaving the country of their nativity, came to the United States and made permanent homes therein and became citizens thereof. These statistics show that the great preponderance of foreign element which has come to our shores in the past generation was from Eastern and Southern Europe. It is this horde from which the Reds are recruited. From its ranks come the agitator and conspirator, fomenting and preaching doctrines inimical and dangerous to our institutions, and yet, so far as the legislation under consideration is concerned, any of its numerous languages may be freely taught in any grade of the private and parochial schools of Ohio, without possibility of molestation.

The teaching of the German language in Ohio, for a great many years, has taken place principally in the parochial schools of the Evangelical Lutheran Church. Such teaching has been very largely for religious purposes. The members of that Church have desired that the religion of Martin Luther should be taught to their children in Luther's language. For that purpose a knowledge of that language is indispensable. There are no Lu-

theran parochial schools in which the elementary branches are not taught in the English language. In many of them an English course of religious instruction has been added. Hundreds of the Lutheran parochial schools are now wholly English. Eventually, doubtless, all will become so. That is the trend. It is advocated by the leading Lutheran publications. To assume, for legislative purposes, that any of these schools is a "preserve of treason" is a libel upon their entire history. Charles McKenney, president of the Michigan State Normal College, recently said:

"There is no more loyal group of men in America than those who come from parochial schools. One-fourth of all the men in the late world war who fought for America came from parochial and private schools."

There is nothing new in that part of the "Ake Law" which requires the teaching of the common branches in the elementary schools in the English language. That has been the statutory policy of the State of Ohio for more than fifty years, as will appear from an examination of Section 7729 of the General Code, which is repealed by the act in question. That policy deserves the commendation of every citizen and should be, and no doubt will be, rigorously adhered to. For many years after the formation of the state, it was the legislative policy to confide to the boards of education the authority to prescribe the branches to be taught in the schools. Gradually, however, that policy was departed from, and, as the public school system developed, prescribed grades and courses

were provided for by legislation. With respect to the elementary schools, we now have Section 7648 of the General Code, which is referred to in the "Ake Law," and which is as follows:

"Sec. 7648. An elementary school is one in which instruction and training are given in spelling, writing, arithmetic, English language, English grammar and composition, geography, history of the United States, including civil government, physiology and hygiene. Nothing herein shall abridge the power of boards of education to cause instruction and training to be given in vocal music, drawing, elementary algebra, the elements of agriculture and other branches which they deem advisable for the best interests of the schools under their charge."

There is nothing in this section, except as modified by the "Ake Law," which prevents the teaching of any foreign language in the elementary schools, under the authority to teach "other branches." And such might very advantageously be done, for it is only during the impressional years of early childhood that a foreign language can be successfully acquired. A child may learn two or three languages as readily as one. When it approaches maturity, such knowledge is difficult and almost impossible of acquisition.

It is declared in Section 7 of the Ohio Bill of Rights that "knowledge" is "essential to good government," and it is, in that section, ordained that:

"it shall be the duty of the general assembly to pass suitable laws . . . to encourage schools and the means of instruction."

This injunction, it will be noted, was not confined to the system of public common schools contemplated in other provisions (Sections 2 and 3 of Article VI) of the state constitution, but was a broad mandate for the encouragement of the acquisition of "knowledge."

Under these provisions of the state constitution, it is left largely to the legislative discretion to determine what laws are "suitable" to "encourage schools and the means of instruction," but subject always to the limitations upon legislative power to be found in other parts of the state instrument and in the Federal Constitution. The power may go, as it has, to the extent of requiring and enforcing attendance at school during specified ages, with opportunity of acquiring knowledge in designated branches of learning. To restrict the opportunity of becoming familiar with any branch of human learning, including foreign languages, is not to "encourage the means of instruction."

### Liberty.

Our state and federal constitutions created no personal rights. They safeguard and guarantee rights inherent in the individual from his creation. Man existed before governments, with all the essential and inalienable rights incident to his existence. It is not for the state to encroach upon or destroy them. Its mission is to protect and safeguard them. One of those inalienable rights is to acquire knowledge, and that includes a knowledge of foreign languages. Such knowledge has always been regarded as a legitimate, if not a necessary branch of edu-



cation. The right to teach and to learn a foreign language is an attribute of liberty.

It was said by Mr. Justice Harlan, in his dissenting opinion in the case of **Berea College vs. Kentucky**, 211 U. S., 45, 67:

"The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its use may not be forbidden or interfered with by Government—certainly not unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction, harmless in itself and beneficial to those who receive it, is a substantial right of property—especially when the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States."

Goethe said:

"A man who is ignorant of foreign languages is ignorant of his own."

Lord Macauley observed:

"Charles V said that a man who knew four languages was worth four men."

In the dawning nationalization of the world, a knowledge of the leading languages of mankind must be of ever growing importance and a necessary part of the education of our youth. National Commissioner of Education Claxton said, March 12, 1918:

"For practical, industrial and commercial purposes, we shall need a knowledge of the German language more than we have needed it in the past.

The fact that we are at war with Germany should not, I believe, affect in any way our policies in regard to the teaching of the German language in our schools."

Knowledge, upon which the fabric of our institutions are declared to rest, is a broad term.

"The sure foundations of the state are laid in knowledge, not in ignorance; and every sneer at education, at culture, at book learning, which is the recorded wisdom of the experience of mankind, is the demagogue's sneer at intelligent liberty, inviting national degeneracy and ruin."

**George Ticknor Curtis.**

There is nothing in the German language, as a language, inherently improper or immoral. It is one of the great languages of mankind and its literature is not surpassed by any other. To arbitrarily deprive a citizen of the United States of the right to acquire a knowledge of it, or from teaching it, through the medium of a criminal prosecution based upon a penal statute prohibiting it, is to deprive him of liberty without due process of law. The subject matter is such that it cannot be made the predicate of a criminal statute. Legislative fiat cannot transform into a crime an act or thing which in its nature is entirely innocent and proper.

The right to teach knowledge in all its branches, as an avocation, is fundamental and inalienable.

It was said by Mr. Justice Bradley, in the case of **Butchers Union Company vs. Crescent City Company**, 111 U. S., 746, 762:

"The right to follow any of the common occupations of life is an alienable right. It was formu-

lated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness' \* \* \* I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States. \* \* \* But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty, for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already mentioned, is a material part of the liberty of the citizen."

The "liberty" safeguarded by the Fourteenth Amendment is not mere freedom from physical incarceration. It embraces in its broad scope the license to exercise, except when the public welfare imperatively demands its curtailment, all the natural rights incident to existence in a civilized country.

In the case of **Allgeyer vs. Louisiana**, 165 U. S., 578, 589, Mr. Justice Peckham, speaking of the Fourteenth Amendment, said:

"The liberty mentioned in that Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all con-

tracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Speaking of the solicitude of this court with respect to the constitutional guaranties relating to personal liberty, and particularly of the Fourth and Fifth Amendments to the Federal Constitution, Mr. Justice Clark, in the case of **Gouled vs. United States**, 255 U. S., 298, 303, said:

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in **Boyd vs. United States**, 116 U. S. 616, in **Weeks vs. United States**, 232 U. S. 383, and **Silverthorne Lumber Co. vs. United States**, 251 U. S., 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments (Fourth and Fifth). The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property;' they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of **habeas corpus** and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well intentioned but mistakenly overzealous executive officers."

There can be no liberty in a state where its laws make it a crime for citizens of the United States to teach or to be taught a foreign language. There can be no liberty to

a parent, in such a state, under such a law, who may desire to have imparted to his child, in a private or parochial school, a knowledge of a foreign language. There is no more "treason" in a language, as such, than there is in a phonograph.

### Equality.

The constitutional guaranty of equality is not second in importance to that of liberty. The principle of equality of right and opportunity is the very cornerstone of our institutions. It was the first note in the bugle call of the Declaration of Independence. It is in itself an attribute of liberty. The Fourteenth Amendment safeguard of the equal protection of the laws is a pledge of the protection of equal laws.

Mr. Justice Strong, speaking for the court, in the case of **Strauder vs. West Virginia**, 100 U. S., 303, 310, said:

"The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty or property."

The objection in the court below that the act in question lacked the essential constitutional element of equality was dismissed with the gesture that:

"The legislation in question is of equal application to every pupil of the state who has not completed a course of study equivalent to that prescribed

in the first seven grades of the elementary schools, regardless of nationality, ancestry, or place of birth, and is, therefore, of equal operation upon every person within the designated grade."

Classification has not infrequently been the cloak under which was hidden arbitrary invasion and violation of the constitutional guaranties of equality. The class referred to by the court was not the class or classes which the act created, which it was claimed rendered it nugatory. It created a class of those who followed the avocation of teaching the German language, and prohibited them from teaching the same in the private and parochial schools of the state to pupils below the eighth grade, while it permitted teachers of any other foreign language to teach the same to such pupils. It segregated into a class such pupils who might desire to acquire a knowledge of the German language, while other such pupils, who might desire it, could be taught and might acquire a knowledge of any other foreign language. It isolated into a class the parents of all such pupils in such schools, who might desire to have imparted to their children a knowledge of the German language.

These classes, so segregated and isolated, are arbitrary, artificial, capricious and unreasonable. They are not germane to the subject matter of teaching and acquiring knowledge. They are clear and hostile discriminations against particular persons and classes, of a character unusual to the practices of our governments. The act has no attribute of equality of operation.

It is not to be questioned that the state may distinguish,

select and classify objects of legislation, but such legislation must not only operate equally upon all within the class but the classification must furnish a reason for and justify its creation. The reason must inhere in the subject matter and rest upon some basis which is natural, germane and substantial. The classification attempted in the act in question, if it can be called such, was mere isolation and arbitrary selection. There is no fair reason for the exclusion of the teaching of the German language in the grades of the schools in question that would not require, with equal force, the extension of the exclusion to all other foreign languages.

### Privilege.

The right to pursue the avocation of a teacher of a foreign language is a privilege. The right to acquire a knowledge of a foreign language is a privilege. The right of a parent to have his child taught a foreign language is a privilege. All of these particular and peculiar advantages fall under the constitutional guaranties of liberty. They are destroyed by the act in question. The Fourteenth Amendment throws its broad mantle of protection over them by inhibiting the states from passing or enforcing any law which shall abridge them.

"Privilege" is defined to be:

"The enjoyment of some desirable right.

"A private or peculiar favor enjoyed.

"A peculiar advantage."

Cent. Dict.

### **Due Process of Law.**

The "due process of law" safeguarded by the Fourteenth Amendment means not only the right of hearing before a competent tribunal, but freedom from arbitrary and unreasonable legislative acts. Such acts are not cured, so far as due process is concerned, because they contemplate or provide for a trial or prosecution in a court. "Due process of law," as applied to a criminal prosecution, cannot mean less than that the accusation is based upon a valid and constitutional law. Jurisdiction of the court or tribunal to hear and determine the case is an essential element of due process. There can be no jurisdiction where the prosecution rests upon a void and unconstitutional law.

### **Similar Acts in States Other Than Ohio.**

About the time of the adoption of the Ohio enactment here involved, statutes somewhat similar were adopted in two or three other states. The constitutionality of those adopted in Iowa and Nebraska were passed upon in the Supreme Courts of those states.

The following is a copy of the Iowa act:

"Section 1. That the medium of instruction in all secular subjects taught in all of the schools, public and private, within the state of Iowa, shall be the English language, and the use of any language other hereby prohibited; provided, however, that nothing herein shall prohibit the teaching and studying of foreign languages as a part of the regular school course \* \* \* above the eighth grade."



There was a penal section for violation of Section 1.

The Supreme Court of the state, in the case of **State of Iowa vs. Bartels**, 191 Iowa, 1060, held:

“The teaching of ‘reading’ in a parochial school to pupils under the eighth grade by means of books on secular subjects in the German language is violative of Ch. 198, Acts 38th G. A., even though the purpose of such teaching is to qualify such children, in accordance with the beliefs of the church, (1) to read and understand the German catechism and bible, in order to become communicants of the church, and (2) to participate intelligently in the home with their parents in religious worship and instruction in the German language, and even though all common school branches, **including reading**, are also taught in English in said school.

“Evans, C. J., Weaver and Preston, JJ., dissent, holding that, under the stipulated record, the teaching in question was for a religious purpose—was not secular.

“The prohibition against teaching in other than the English language of secular subjects in public and private schools in named grades is not subject to the vice (1) of violating inalienable rights (2) of prohibiting the free exercise of religion, (3) of constituting class legislation; or (4) of abridging the privileges or immunities of citizens of the United States.

“Evans, C. J., Weaver and Preston, JJ., dissent as to clause 2, holding that, under the particular record of this case, the instruction in question was non-secular.”

The Nebraska act provided:

“Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any other language than the English language.

"Section 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade, as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides."

There was a penal section, providing for fine or imprisonment for violation of the act.

The Supreme Court of the state, in the case of **Nebraska District of Evangelical Lutheran Synod vs. McKelvie**, 104 Neb., 93, construed the act not to prohibit the teaching of a foreign language in the elementary schools, in addition to the regular course of study in the English language and outside of regular school hours during the required period of instruction, so as not to interfere with the elementary education required by law. The court further held:

"7. If the law should be construed to mean that parents or private tutors might teach a foreign language, but that others could not employ teachers to give instruction in a class or school, it would be an invasion of personal liberty, discriminative and void, there being no reasonable basis of classification."

There is in this country a constant and growing endeavor, encroaching more and more upon the domain of individual liberty, to establish as a fundamental that an American citizen possesses such rights only as a legislative majority permits. This theory may be well enough in a country whose constitution is implied in its institutions and customs, and where the popular interpretation of the constitution overrides the juristic interpretation.

It has no place with us, where life, liberty, equality and property are guaranteed and safeguarded in the written primordial law.

Respectfully submitted,

TIMOTHY S. HOGAN and

FRANK DAVIS, JR.,

Attorneys for Plaintiffs in Error.

# In the Supreme Court of the United States

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H. H. BOHNING,

*Plaintiff in Error,*

vs.

THE STATE OF OHIO,

*Defendant in Error.*

No. 561

EMIL POHL,

*Plaintiff in Error,*

vs.

THE STATE OF OHIO,

*Defendant in Error.*

No. 562

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## BRIEF ON BEHALF OF DEFENDANT IN ERROR.

---

### STATEMENT OF FACTS.

Section 7762-1 of the General Code of Ohio applies to and seeks to control the course of study in the elementary branches of the public schools of Ohio in the following language:

“That all subjects and branches taught in the elementary schools of the state of Ohio below the eighth grade shall be taught in the English language only. The board of education, trustees, directors and such other officers as may be in control, shall cause to be taught in the elementary schools all the branches named in Section 7648 of the General Code.

Provided, that the German language shall not be taught below the eighth grade in any of the elementary schools of this state."

Section 7762-2 provides for the same control of the course of study in schools connected with benevolent and correctional institutions and also to private and parochial schools in the following language:

"All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct pupils who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of this state, shall be taught in the English language only, and the person or persons, trustees or officers in control shall cause to be taught in them such branches of learning as prescribed in section 7648 of the General Code or such as the advancement of pupils may require, and the persons or officers in control direct; provided that the German language shall not be taught below the eighth grade in any such schools within this state."

Section 7648 of the General Code of Ohio mentioned in these two sections defines elementary schools as follows:

"An elementary school is one in which instruction and training are given in spelling, reading, writing, arithmetic, English language, English grammar and composition, geography, history of the United States, including civil government, physiology and hygiene. Nothing herein shall abridge the power of boards of education to cause instruction and training to be given in vocal music, drawing, elementary algebra, the elements of agriculture and other branches which they deem advisable for the best interests of the schools under their charge."

Section 7649 of the General Code of Ohio defines High School as follows:

“A high school is one of higher grade than an elementary school, in which instruction and training are given in approved courses in the history of the United States and other countries; composition, rhetoric, English and American literature; algebra and geometry; natural science, political or mental science, ancient or modern foreign languages, or both, commercial and industrial branches, or such of the branches named as the length of its curriculum makes possible. Also such other branches of higher grade than those to be taught in the elementary schools, with such advanced studies and advanced reviews of the common branches as the board of education directs.”

and Section 7651 defines what shall constitute a college.

Section 7744 of the General Code fixes the number of weeks which shall constitute a school year for elementary schools at not less than thirty-two nor more than forty weeks.

Section 7645 of the General Code provides that Boards of Education are required to prescribe a graded study for all schools under their control in the branches named in Section 7648 General Code.

## ARGUMENT.

All the foregoing laws have for their object the regulations known as compulsory education. Such laws have always been held to be not only a proper exercise of police power, but also a very necessary part in the fundamental institutions of our country, having for its object the welfare of society and the upbuilding of an intelligent citizenship.

We find then that the legislature has the right, more than that, the duty of providing adequate means of education of the young.

It surely has the right to prescribe the course of study which shall be taught. In Section 7648 of the Code the legislature has named the subjects which shall be taught in and which shall constitute a school an elementary school.

Having defined what shall be taught, and clearly having the right to so define, has not the legislature a correlative right to say what shall not be taught and the language in which the teachings shall be conducted.

Experience has shown that it is not wise to keep a young child or one that would be a student in the elementary branches in attendance on school more than forty weeks out of fifty-two. It has also demonstrated that it requires at least thirty weeks in any one year to impart the knowledge necessary in certain essential studies.

The legislature of Ohio has therefor enacted laws fixing the maximum and minimum length of attendance in elementary schools in any year, and prior to the enactment of the legislation complained of herein had attempted only to say what branches of knowledge should be taught.

Let us imagine, for example, that out of thirty weeks which a board of education fixed as a school year of an elementary school, it would provide that ten weeks of this term should be devoted to the subjects mentioned in Section 7648 G. C. and the remaining twenty weeks to the teaching of dancing or the Hebrew language or the German language or other foreign language, can it be that such a course would be carrying out the spirit of a compulsory educational law or the laws as laid down by the Ohio Legislature? Would not such a course be directly contrary to the purposes of such laws?

Sections 7762-1 and 7762-2 of the General Code are elements of the compulsory educational law, and so far as their natural effect would be operates to the extent that they prohibit spending any of the time deemed essential to acquiring knowledge in the branches which are affirmatively prescribed by teaching a language not deemed essential to good intelligent citizenship in the State of Ohio.

Section 7762-2 General Code applies this same rule to private, institutional and parochial schools. It is as essential that pupils in these schools should receive standard educational facilities as those who attend the public schools. The objective, intelligent citizenship, is the same and it cannot be said that because a child attends a private school or a parochial school that the standard of its educational requirement should be any less than is required of a pupil in the public schools.

The only remaining question is that Section 7762-2 provides that the teaching shall be conducted in the English language only. We think that this is clearly within the right of a legislature in an English speaking country; to say otherwise would create conditions chaotic in the extreme, with results that are unthinkable.



Much is said in the brief of plaintiffs in error about personal rights, liberty, equality, privilege, due process of law, poison virus, etc. These questions are not involved in the law complained of. The first duty of society to itself is to see to it that the elements which compose society have the essentials of good citizenship. This is paramount to any whim or notion that any person or set of persons may have. No religious liberties are interfered with by the act in question; if a parent wishes his child taught Martin Luther's dogma in Martin Luther's language, there is no law against the child being taught that language, unless it takes so much of the child's time and health as to endanger society in that regard, nor does the act complained of interfere with any substantial right under the Constitution. It does not interfere with religious liberty, nor does it abridge any privilege or immunity, nor deprive any person of life, liberty or property, nor does it deny to any person equal protection of the laws. It is a reasonable regulation, having for its objective the highest purpose of government, the upbuilding of an intelligent citizenship, or as said by Chief Justice Fuller in the case of *Giozza vs. Tierman*, 148 U. S. 657-662, it tends to promote "their health, morals, education and good order."

A large portion of plaintiffs in error's argument is addressed to the proposition that the act in question is inadvisable and inexpedient. With this proposition we, as counsel, and the Court have nothing to do; the legislature is the sole judge of the expediency and advisability of its legislative acts, and it is only when they clearly are violative of constitutional rights that they may be declared void.

In this connection we may remember that the then German Emperor at one time made a boast that the

United States could not engage in war with his country because of the large number of his countrymen residing in the United States, and that by the continued teaching of the language of his country in the schools, and the consequential partiality which this fact would engender in the minds of descendants of people who were of his nation and who resided in the United States, would prevent any active participation by this country in the war. He was mistaken, but there was some logic in his line of thought, and it certainly is within the province of the legislature to enact laws which would effectually make this condition improbable and to prevent the possibility of any such condition being true.

On this point we respectfully refer to the reasoning of the Supreme Court of Ohio in this present case and desire that the language therein contained be deemed to be a part of our argument.

*Pohl vs. State of Ohio*, 102 Ohio State Reports,  
474-477.

Respectfully submitted,

· EDWARD C. STANTON,

· *Prosecuting Attorney, Cuyahoga  
County, Ohio,*

E. J. THOBABEN,

· *Assistant Prosecuting Attorney,  
Cuyahoga County, Ohio,  
Attorneys for Defendant in Error.*

**TRANSCRIPT OF RECORD.**

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1932.**

**No. 440.**

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**NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN  
SYNOD OF MISSOURI, OHIO, AND OTHER STATES  
ET AL, PLAINTIFFS IN ERROR,**

**vs.**

**AMUEL R. MCKELVIE, CLARENCE A. DAVIS, OTTO F.  
WALTER, AND THEIR DEPUTIES, SUBORDINATES, AND  
ASSISTANTS.**

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**ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.**

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**FILED JUNE 22, 1933.**

**(28,990)**

(28,990)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 440.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN  
SYNOD OF MISSOURI, OHIO, AND OTHER STATES  
ET AL., PLAINTIFFS IN ERROR,

vs.

SAMUEL R. McKELVIE, CLARENCE A. DAVIS, OTTO F.  
WALTER, AND THEIR DEPUTIES, SUBORDINATES, AND  
ASSISTANTS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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No. 22424.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF  
MISSOURI,

v.

McKELVIE.

Pleas Before the Supreme Court of the State of Nebraska at a Term  
Thereof Begun and Holden at the Capitol, in the City of Lin-  
coln, in said State, on the 2d Day of January, 1922.

Present:

Hon. Andrew M. Morrissey, Chief Justice.

Hon. Charles B. Letton, Judge.

Hon. William B. Rose, Judge.

Hon. James R. Dean, Judge.

Hon. Chester H. Aldrich, Judge.

Hon. George A. Day, Judge.

Hon. Leonard A. Flansburg, Judge.

Attest:

H. C. LINDSAY,  
*Clerk.*

Be it remembered, That on October 22, 1921, there was filed in  
the office of the clerk of the Supreme Court of Nebraska in the  
above entitled case, a certain Transcript from the District Court of  
Platte County, Nebraska, and the following are true and correct  
copies of such portions thereof as have been requested in the original  
Præcipes attached hereto for this record to be made a part of the  
return to the writ of error in the proceedings to review said cause  
in the Supreme Court of the United States:

STATE OF NEBRASKA,  
*Platte County, ss:*

Pleas before the District Court of the County of Platte, State of Nebraska, at a term begun and held in the said County of Platte on the 4th day of April, A. D. 1921, and at subsequent terms of said District Court held in the said County of Platte, before Hon. Frederic W. Button, Judge of said District Court.

No. 5055.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, Ohio, and Other States and Diederick Siefken, Plaintiffs,

VS.

SAMUEL R. MCKELVIE, CLARENCE R. DAVIS, and OTTO F. WALTER and Their Deputies, Subordinates, and Assistants, Defendants.

3 Be it remembered, That heretofore, to-wit: On the 28th day of May, 1921, a Petition was filed in the office of the Clerk of the District Court of Platte County, Nebraska, in the words and figures following, to-wit:

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, Ohio, and Other States and Diederick Siefken, Plaintiffs,

VS.

SAMUEL R. MCKELVIE, CLARENCE R. DAVIS, and OTTO F. WALTER and Their Deputies, Subordinates, and Assistants, Defendants.

*Petition.*

The plaintiffs, suing in their own behalf and on behalf of all others similarly situated, and injuriously affected by the legislative act hereinafter mentioned, for their cause of action against the defendants allege:

I.

That the plaintiff, said Nebraska District of said Synod, hereinafter called first party plaintiff, is and for more than twenty years last past has been, a corporation duly organized, existing under and by virtue of the laws of Nebraska, having for its object the spread of the gospel and promotion of religion, morality and education in accordance with the canons, tenets, usages and practices of the Lutheran Church of America.

II.

That in pursuance of its said purpose, the first party plaintiff has established and now supports and maintains in the state of Ne-

braska more than four hundred (400) congregations or parishes, with twenty-six thousand (26,000) communicants, two hundred (200) parochial schools with pupils thereof numbering six thousand (6,000) or upward, and has erected and now owns, keeps and maintains school buildings and grounds in said state devoted exclusively to aforesaid purposes exceeding two hundred and

4 fifty thousand dollars (\$250,000) in value, some of which said schools are located in Platte County under competent instructors, and the grades whereof conform to the grades of the public schools of said county, and the course of study in secular branches is identical with and in all respects equal to that of said public schools and is, and for many years has been, engaged in missionary work and in preaching, carrying and spreading the Christian religion as understood and taught by said church throughout the state of Nebraska, especially among those of foreign birth in need of spiritual guidance, instruction and consolation, and the affairs of the said several congregations or parishes and schools are managed by local boards of trustees, consisting of three or more members, aided, advised and assisted by their respective pastors, who assemble at stated times and when called together for the transaction of business of their respective congregations and organizations at which meetings questions pertaining to the said business are raised, discussed and voted upon by the several members of such boards.

### III.

That each of said congregations is under the spiritual guidance and direction of a pastor educated in the canons, doctrines and tenets of said church and thereunto duly ordained and authorized by the said church to teach and preach the gospel as understood, taught and practiced by the said church, and to instruct and prepare persons for admission as members into said church and their respective congregations.

### IV.

That among the duties enjoined by said church upon its members is to assemble with the members of their families and attend at stated period- religious services conducted therein consisting of sermons, instruction in matters of faith and religion, and other religious exercises by the said pastors, to conduct devotional exercises in their homes, to cooperate with their pastors in instructing, advising and admonishing their children and members of

5 their families in matters of religion and morals, and to rear them in accordance with the teachings of said church, and with a knowledge of the faith, commandments, doctrines and practices thereof, and in preparing them for admission to membership in said church.



## V.

That a large percentage of the members of the several congregations aforesaid, and the said boards of trustees, and the people of foreign birth among whom the first party plaintiff is engaged in missionary work as aforesaid, and their families have insufficient knowledge of the English language to receive or impart instruction in matters of religion and morals in that tongue, or to conduct or participate understandingly in religious services and devotional exercises conducted therein, or in the transaction of business by said local board, or in any language other than German, many of whom are parents of families who have reached an age where it is impossible for them to acquire a sufficient knowledge of English to enable them to receive or impart religious instruction in that language and in order that such parents may be able to counsel, admonish, and instruct their children in matters of religion and morals, and that such parents and their families may keep in touch with each other in such matters and all participate intelligently in the religious services and exercises of the church and home, this plaintiff has taught and still continues to teach the German language in its said schools to pupils under the ninth grade, concurrently with the English language, but avers that for several years last past it has been and still is its purpose and settled policy to abolish the use of all languages other than English in its religious services and instruction at the earliest rate consistent with the preservation of the bonds between the parents and children of its said congregations in matters of faith and morals and that pursuant to this policy, it has caused the use of the German language to be abandoned in more  
6 than ten per cent of its said congregations and schools, and in the remaining schools said language is taught and employed only to instruct the pupils in matters of religion and morals to enable them to converse with their parents in such matters and join with them understandingly in the same religious services and exercises.

## VI.

That the plaintiff, Diederick Siefken, hereinafter called second party plaintiff, is, and for more than five years last past, has been a citizen of the United States, a resident of the city of Columbus, and State of Nebraska, a married man and the head of a family, a member of an organized congregation of the said Lutheran Church in said city, and a patron of the said school so as aforesaid kept and maintained therein, erected, kept and supported and maintained by the members of the said church and the income derived therefrom from tuition paid by the pupils attending the same; and that this plaintiff has a child twelve years of age, who is, and for more than two years last past has been a pupil in said school in said city, but has not completed her education in the German language, and it is the wish and the intention of this plaintiff that his said child shall continue as a pupil therein and take therein instructions

in the German language in such a way and for such time as will enable her to speak, read and write said language correctly and enable her to converse and communicate with her parents and other members of said congregation in said language intelligently, and that the said school is in charge of a teacher thoroughly qualified to teach the said language and any of the branches required to be taught to pupils in the public schools of Nebraska, and is able, ready and willing to give such instructions to the plaintiff's said child, unless thereunto prevented, as hereinafter set forth.

## VII.

That at the regular session of the legislature of the state of Nebraska in the year 1921, an act was passed by said body and approved by the Governor of said state, which, including the title thereto, is in the words and figures following, to wit:

"A bill for an Act to declare the English language the official language of this state, and to require all official proceedings, records and publications to be in such language and all school branches to be taught in said language in public, private, denominational and parochial schools; to prohibit discrimination against the use of the English language by social, religious or commercial organizations; to provide a penalty for a violation thereof; to repeal Chapter 249 of the Session Laws of Nebraska for 1919, entitled —'An Act relating to the teaching of foreign languages in the state of Nebraska' and to declare an emergency.

Be it enacted by the people of the State of Nebraska:

Section 1. The English language is hereby declared to be the official language of this state, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denominational and parochial schools.

Sec. 2. No person, individually or as a teacher, shall, in any private, denominational, or parochial or public school, teach any subject to any person in any language other than the English language.

Sec. 3. Languages other than the English language may be taught as languages only, after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county or the city superintendent of the city in which the child resides. Provided, that the provisions of this act shall not apply to schools held on Sunday or on some other day of the week which these having the care and custody of the pupils attending same conscientiously observe as the Sabbath, where the object and purpose of such schools is the giving of religious instruction, but shall apply to all other schools and to schools held at all other times. Provided that nothing in this act shall prohibit any person from teaching his own children in his own home any foreign language.

Sec. 4. It shall be unlawful for any organization whether social, religious or commercial, to prohibit, forbid or discriminate against the use of the English language in any meeting, school or proceeding, and for any officer, director, member or person in authority in any organization to pass, promulgate, connive at, publish, enforce or attempt to enforce any such prohibition or discrimination.

Sec. 5. Any public official, teacher, instructor, or other person who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof be fined in any sum not exceeding one hundred (\$100.00) dollars or less than twenty-five (\$25.00) dollars, or be confined in the county jail for a period not exceeding thirty days for each offense.

Sec. 6. Should the courts declare any portion of this act unconstitutional such decision shall effect only the portion so declared to be unconstitutional and shall not effect any other section or any other part of this act, and it is further provided that each part of this act, so far as an inducement for the passage of this act is concerned is independent of every other part.

Sec. 7. Chapter 249, of the Session Laws of Nebraska for 1919, entitled, 'An Act relating to the teaching of foreign languages in the State of Nebraska,' is hereby repealed.

Sec. 8. Whereas, an emergency exists this act shall be in force from and after its passage and approval."

### VIII.

9 That the said schools so as aforesaid maintained and conducted by the first party plaintiff and the said congregations have established and enjoy, and the first party plaintiff and said congregations now own the good will in connection therewith of great value, to wit: not less than fifty thousand dollars (\$50,000.00), and that the efficiency of the said schools and the value of the said good will is due to and dependent to a large degree upon the course and method of instruction hereinbefore mentioned in respect to the teaching and use of languages other than English therein as hereinbefore specified and in teaching such other languages therein to pupils below the ninth grade, and in giving instruction in languages other than English to pupils, and that the enforcement of the said act would so operate to impair the efficiency of the said schools and to defeat their purpose that the said good will would be thereby greatly depreciated and destroyed.

### IX.

That the enforcement of the sections, 2, 3, 4, and 5, or any of them, of said act would greatly interfere with, hinder and impede the work of the plaintiffs in the spread of the gospel in the State of Nebraska and in the said missionary work and in the conduct of the business of the said congregations and would operate to prevent

the first party plaintiff and others similarly situated from imparting religious instruction and ministering to the spiritual wants of persons who do not speak or understand the English language, and from fitting and preparing its pastors and assistants for the discharge of their duties in the premises, and to prevent such of its pastors and assistants who have been educated in a foreign language and who are not sufficiently acquainted with the English language to preach or impart religious instruction in such language, from preaching or teaching and discharging their duties to the said church, and to deprive said first party plaintiff and its said pastors and all others similarly situated, of exercise of the right of free speech, their religious liberty, and of their liberty and property, without due process of law, to deny to them the equal protection of the law, and to retard, hinder and discourage religion, morality and education, and is an unjust and unreasonable restraint upon liberty of the plaintiffs, its officers, pastors, teachers and agents, and all others similarly situated, and is in contravention of the constitution of the state of Nebraska and the constitution of the United States, and null and void. Amendment. And the plaintiffs further allege that sections 1 and 2 of said act are unconstitutional, null and void for the further reason that the provisions thereof, nor any of them, are embraced or included in the title to said act.

## X.

That the defendant, Samuel R. McKelvie, is the duly elected and acting Governor, and the defendant, Clarence A. Davis, the attorney general of the state of Nebraska, and the defendant, Otto F. Walter, is the county attorney of the county of Platte of said state, and that the said defendants are severally threatening and intending to proceed under and by virtue of their respective offices to enforce the said sections 2, 3, 4, and 5 of said act, and to enforce the observance thereof by the plaintiffs, its pastors, officers and teachers, by causing the arrest and prosecution of the first party plaintiff's pastors, officers and agents, and the teachers so as aforesaid employed and kept by the first party plaintiff and said congregations, charging them severally with violating the provisions of said Act by instructing pupils below said ninth grade to speak and write the German language, and in languages other than English, and will carry their said threats into execution and cause said arrests to be made and said teachers prosecuted as aforesaid, unless enjoined and restrained by *by* this court, and by said means compel the plaintiff to cease so as aforesaid to instruct their said pupils on any subject in any language other than English, or to teach or instruct their said pupils under the said ninth grade to speak or write the said German language, thereby greatly impairing the usefulness and prestige of said schools and the value of its said property and diminishing its income therefrom, and in a material and substantial way deprive the first party plaintiff and its teachers, pastors, and officers, and parishioners, and the second party plaintiff of their

liberty and property, without due process of law, to the great and irreparable injury of the plaintiff and its said parishioners, for which the law affords them no adequate remedy.

Wherefore, plaintiffs pray for a temporary order, enjoining and restraining the defendants, their deputies and agents and all others acting under them respectively, and their successors in office, from enforcing any of the provisions of said act in any manner whatsoever, and that upon the final hearing herein it shall be adjudged and determined that the said act be adjudged and decreed to be unconstitutional, null and void, as being in violation of the provisions of the constitution of the United States and of the constitution of the state of Nebraska, and for such other and further relief as may be deemed equitable in the premises.

SANDALL & WRAY,  
A. F. MULLEN,  
ALBERT & WAGNER,  
*Attorneys for Plaintiffs.*

STATE OF NEBRASKA,  
*Platte County, ss:*

Diederick Siefken, being first duly sworn, deposes and says that he is one of the plaintiffs in the above entitled cause, that he has read the foregoing petition, knows the contents thereof, and that the allegations contained in said petition are true.

DIEDERICK SIEFKEN.

Subscribed in my presence and sworn to before me this 24 day of May, 1921.

[SEAL.]

J. C. BYRNES,  
*Notary Public.*

(Endorsed:) Filed May 28-1921. Ethel Gossard, Clerk.

12 And on the same day, to-wit: On May 28th, 1921, a Court Order was entered in said cause in the words and figures following, to-wit:

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO AND OTHER STATES et al., Plaintiff,

VS.

SAMUEL R. MCKELVIE, CLARENCE R. DAVIS and OTTO F. WALTER, and Their Deputies, Subordinates and Assistants, Defendants.

*Order.*

May 28, 1921.

Upon reading the petition of the plaintiff duly verified and for good cause shown, it is ordered that an injunction be granted herein enjoining the above named defendants, their deputies, subordinates,

assistants, and all persons acting by, through or under them, from enforcing or attempting to enforce any of the provisions of Section 2, 3, 4, and 5 of an Act purporting to have been enacted and passed by the 40th Session of the Legislature of the State of Nebraska, known as Senate *File* No. 160, entitled:

"A Bill for an Act to declare the English language the official language of this state, and to require all official proceedings, records and publications to be in such language and all school branches to be taught in said language in public, private, denominational and parochial schools; to prohibit discrimination against the use of the English language by social, religious or commercial organizations; to provide a penalty for a violation thereof; to repeal Chapter 249 of the Session Laws of Nebraska for 1919, entitled—'An Act relating to the teaching of Foreign languages in the State of Nebraska' and to declare an emergency."

until the further order of the court, upon the plaintiff's executing and delivering to the clerk of said court an undertaking to the defendants in the sum of \$500.00, with approved sureties, conditioned as required by law.

FREDERICK W. BUTTON,  
*Judge.*

13 And afterwards, to-wit: On June 16th, 1921, Petition of Intervention of John Siedlik was filed in said cause in the words and figures following, to-wit:

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, Ohio and Other States, and Diederick Siefken, Plaintiffs,

vs.

SAMUEL R. MCKELVIE, CLARENCE R. DAVIS and OTTO F. WALTER, and Their Deputies, Subordinates and Assistants, Defendants.

*Petition of Intervention of John Siedlik.*

Comes now John Siedlik and intervenes in this suit as a party plaintiff and joins with the plaintiffs in their application for the relief prayed for in their petition, and for cause of action alleges:

1. That the intervenor is a naturalized citizen of the United States, was born in Poland about thirty-nine years ago, and at the present time and for more than five years last past has been a resident taxpayer of Douglas County, Nebraska, and is a qualified voter and elector in the State of Nebraska.

2. That intervenor is now and for many years last past has been a member of St. Francis Parish in South Omaha, Nebraska, and is a communicant of the Roman Catholic Church.



3. That Intervenor has a family, consisting of his wife and four children; that intervenor's wife was born in Poland; that at the time intervenor came to this country he could not speak the English language; that the wife of this intervenor cannot speak the English language at the present time; that intervenor has acquired a working knowledge of the English language in so far as it relates to business and every day affairs; that in religious matters he has not acquired sufficient knowledge of the English language to either give or receive instructions in religion and morality in said language; that the language used in his home is Polish; that 14 all of the children in said home, in communicating with the intervenor and his wife, use the Polish language.

4. That it is the religious duty of this intervenor and his wife to instruct their children in religion and morals and that such instruction has been given and is now being given by this intervenor and his wife in said Polish language, and that it is impossible for this intervenor or his wife to give religious instruction to their children in any other language.

5. That intervenor, as a part of the plan of educating his children, has contributed to the erection and support of a parochial school in the aforesaid parish and is now and for more than five years last past has contributed to the support and maintenance of said school; that his children have attended and are now attending said school; that all of the expense of erecting, maintaining and supporting said school is borne by this intervenor and other persons of Polish birth or descent; that no part of the public revenues is used to support said school; that one of the reasons for maintaining said parochial school is to educate the children therein in matters of faith and morals and, in particular, in the doctrines and discipline of the Roman Catholic Church; that the course of study in said school, in so far as the secular branches are concerned, is substantially the equivalent of the public schools in the same community; that the purpose and object of said school is to educate and train the children to understand, speak and use the English language and to educate them so that they will be useful and competent citizens of the United States; that said school has a regular course of study and employs the English language in the instruction of the children, but, in addition thereto, in the lower grades, prior to the passage of the Act in question, taught the Polish language and gave religious instruction to the children in Polish; that the Polish language was 15 used for the purpose of teaching the children English and to instruct said children in matters of religion and morality until said children had a working knowledge of the English language; that after said children had acquired a working knowledge of the English language no instruction was given either in the Polish language or in any subject in said language; that all the instruction given to the children in said school, after said children reach the seventh grade is given in the English language, and no Polish is used above the sixth grade; that the children who complete the regular work in said school have been admitted without examination to

the schools of the city of Omaha and other schools of equal grade; that said school was and is one of the accredited schools of learning in the city of Omaha.

6. That it is the intention and purpose of intervenor to have his children educated in the English language and also to have them acquire a working knowledge of the Polish language, so that they can receive information and be instructed in faith and morals in both the Polish language and the English language.

7. That it is impossible for the teachers in said school to give religious instruction properly to the children in the lower grades in the English language if said children are denied the right to receive a rudimentary education in Polish, and it is impossible for this intervenor and his wife to instruct his children properly in faith and morals and thereby discharge an obligation that is imposed upon them as a matter of conscience; that it is impossible for said children to communicate properly with their teachers and with their mother without using the Polish language.

8. Intervenor alleges that when he contributed to the expense of creating said school and when he contributes to the support and maintenance of the same, it was and is with the intention and understanding that the rudiments of the Polish language be taught to his children in said school and that religious instruction be given to the children therein, who do not understand English, in the Polish language, until said children can acquire a sufficient working knowledge of the English language to understandingly take instruction in said language; that he has children attending said school below the eighth grade that do not have sufficient knowledge of the English language to intelligently receive instruction in the English language; that it is impossible to instruct said children without using the Polish language.

9. That the Act referred to in plaintiffs' petition deprives this intervenor of valuable property rights and of the right to contract; denies to him and others similarly situated the equal protection of the laws; deprives him of his liberty and property without due process of law; denies him the security of perfect religious toleration; molests him in his person on account of his mode of religious worship; molests him in his property rights on account of his mode of religious worship; that it is an unjust and unreasonable restraint upon the liberty of intervenor as a citizen and inhabitant of the State; that said Act operates to deprive this intervenor and others similarly situated of their liberty and property without due process of law and discriminates against one class of religious societies whose members are unable to worship God by the use of the English language; that it operates to interfere with the conscience of intervenor and of his wife and children in respect to their religious instruction; that it operates to retard, hinder and discourage religious education and the dissemination of knowledge; that it is an unjust and unreasonable restraint upon the personal liberty of intervenor and all other persons similarly situated; that said Act contravenes the provisions of the Con-



stitution of the United States, the Enabling Act which admitted Nebraska into the Union, and the Constitution of the State of Nebraska.

Amendment "A."—And intervenor further alleges that  
17 sections 1 and 2 of said act are unconstitutional, null and void for the further reason that the provisions thereof, nor any of them, are embraced or included in the title to said act.

10. That the defendant, Samuel R. McKelvie, is the duly elected and acting Governor of the State of Nebraska, and the defendant Clarence A. Davis is the duly elected and acting Attorney General of the State of Nebraska; that said defendants have indicated that they intend to proceed under and by virtue of their respective offices to enforce the provisions of the law referred to in plaintiffs' petition by causing the County Attorney of Douglas County, Nebraska, to arrest and prosecute the teachers, officials and agents of all schools permitting instruction to be given or which give instruction in any language other than the English language; that, because of this threat and intention on the part of the aforesaid officials, the children of this intervenor have not been permitted to receive instruction in Polish in said school and have been deprived of the right to receive proper instruction in a private school created and maintained in part by this intervenor; that because of the threat and intention of the aforesaid officials the children of this intervenor have not received instruction in said Polish language and that by reason of said threat the teachers and others in charge of said school have ceased to instruct the children of this intervenor in said Polish language, and have thereby prevented and still prevent the children of this intervenor and the children in said school from receiving religious instruction until they can speak and understand the English language, thereby greatly impairing the usefulness and prestige of said school and depreciating the property value thereof, and have, in a substantial way, deprived, and, unless restrained and enjoined, will continue to deprive this intervenor of his personal rights as a citizen and of his property, without due process of law, to the great and irreparable  
injury of this intervenor and others similarly situated, for  
18 which the law affords no adequate remedy.

Wherefore, Intervenor prays for a temporary order enjoining and restraining the defendants, Samuel R. McKelvie, Governor of Nebraska, Clarence A. Davis, Attorney General of Nebraska, their deputies, subordinates and assistants, and the County Attorney of Douglas County, Nebraska, and all others acting under them respectively, and their successors in office, from enforcing or threatening to enforce the provisions of Sections 2, 3, 4 and 5 of said Act, and that, upon the final hearing herein, it be adjudged and determined that Sections 2, 3, 4, and 5 of said Act be unconstitutional, null and void, as being in violation of the provisions of the constitution of the State of Nebraska, the Enabling Act of the State of Nebraska, and of the Constitution of the United States, and for such other and further relief as may be just and equitable.

ARTHUR F. MULLEN,  
*Attorney for John Siedlik, Intervenor,*

STATE OF NEBRASKA,  
Douglas County, ss:

John Siedlik, being first duly sworn, says that he is the intervenor in the above case; that he has heard read the petition in intervention and knows its contents; and that the facts stated therein are true as he believes.

JAN SIEDLIK.

Subscribed and sworn to before me this 10 day of June, 1921.

[SEAL.]

EDWIN C. BOEHLER,  
Notary Public.

(Endorsed:) Filed June 16, 1921. Ethel Gossard, Clerk.

19 And on the same day, to-wit: On June 23rd, 1921, a demurrer was filed in said cause in the words and figures following, to-wit:

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, Ohio, and Other States and Diederick Siefken, Plaintiffs,

vs.

SAMUEL R. MCKELVIE, CLARENCE R. DAVIS and OTTO F. WALTER, and Their Deputies, Subordinates, and Assistants, Defendants.

*Demurrer.*

The above named defendant, Otto F. Walter, County Attorney of Platte County, Nebraska, appearing herein pro se demurs to the petition in the above entitled action on the ground that the petition does not state facts sufficient to constitute a cause of action, in that it is an attempt to interfere by injunction with the administration of the criminal laws of the State of Nebraska, and in that plaintiffs have an adequate remedy at law for the protection of the rights as set forth in the petition.

Dated June 22, 1921.

OTTO F. WALTER,  
County Attorney of Platte County.

(Endorsed:) Filed June 23, 1921. Ethel Gossard, Clerk.

And afterwards, to-wit: On July 21, 1921, a Court Order was entered in said cause in the words and figures following, to-wit:

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF Missouri, Ohio, and Other States and Diedrick Siefken, Plaintiffs,

vs.

SAMUEL R. McKELVIE, CLARENCE R. DAVIS and OTTO F. WALTER, and Their Deputies, Subordinates, and Assistants, Defendants.

20 The application of the American Legion to appear as Amicus Curiae in the above entitled action coming on to be heard, is hereby granted.

The special appearance of defendants, Samuel R. McKelvie and Clarence A. Davis, is overruled, and the motion of the aforementioned defendants, to set aside service of process, is denied.

The motion of defendant, Otto F. Walter to set aside the temporary injunction order, is denied.

The demurrer of defendant, Walter, is overruled, and defendants granted fifteen days in which to answer.

To all of which, defendants except.

Dated, July 21, 1921.

FREDERICK W. BUTTON,  
*Judge of the District Court.*

21 And afterwards, to-wit: On July 26th, 1921, an Answer was filed in said cause in the words and figures following, to-wit:

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF Missouri, Ohio, and Other States and Diederick Siefken, Plaintiffs,

vs.

SAMUEL R. McKELVIE, CLARENCE R. DAVIS, and OTTO F. WALTER and Their Deputies, Subordinates, and Assistants, Defendants.

*Answer.*

Defendants Samuel R. McKelvie, Clarence A. Davis, sued herein as Clarence R. Davis, and Otto F. Walter, appearing herein by their attorney, Clarence A. Davis, Attorney General of Nebraska, answering the petition of plaintiffs herein:

# I.

Deny each and every allegation contained in the paragraph of the petition numbered I, except that defendants admit the due incorporation and existence of a religious corporation under the name of "Nebraska District of German Evangelical Lutheran Synod of Missouri, Ohio and other states."

## II.

Deny the allegations contained in paragraph of the petition numbered II that the course of study in secular branches in schools maintained by the plaintiff is identical with and in all respects equal to that of the public schools of Nebraska.

## III.

Deny each and every allegation in the paragraph of the petition numbered V.

## IV.

Deny each and every allegation in the paragraph of the petition numbered VIII.

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## V.

Deny each and every allegation contained in the paragraph of the petition numbered IX.

## VI.

Deny the allegations in the paragraph of the petition numbered X, that the enforcement of the statute quoted in paragraph VII of the petition would greatly impair the usefulness and prestige of schools maintained by plaintiff and the value of its property and diminishing plaintiff's income therefrom, and in a material and substantial way deprive the plaintiff and its teachers, pastors, officers and parishioners of their liberty and property without due process of law, to the irreparable injury of the plaintiff and its parishioners, and deny the allegation in said paragraph that the law affords them no adequate remedy.

And for a separate defense allege:

## VII.

That a considerable portion of the population of the state is either foreign born or of foreign parentage with a natural tendency towards foreign ideals and ideals of government and with a natural hesitancy to adopt and assimilate American customs, ideas, methods and form of government.

## VIII.

That the continued success of the republican system of government adopted by the United States of America, since its inception, is dependent upon a uniformly enlightened American citizenship in full sympathy with the ideals of this nation.

## IX.

That for sometime there has been an effort to foster and maintain foreign customs, languages and ideals in some communities and localities in this state, and to check the growing Americanization of such communities and to render said communities immune from all influences except those presented by leaders employing a foreign tongue; that the method commonly used has been to preserve the use of foreign languages in such communities that said communities might remain subject to the sole influence of foreign newspapers and foreign leaders, and those employing a foreign tongue; that the method of permanently establishing languages in such communities has been to educate the children of said communities in a foreign language before the child was thoroughly grounded in English; that this insidious foreign propaganda has been extensively carried on under the guise of both education and religion and by the foreign press.

## X.

That to remedy the foregoing situation, which threatens the safety, peace, good order, well being and social welfare of the state and threatens to assume the proportion of a social menace, to limit the fields available for foreign propaganda, to insure the percolation of the fundamental principles of Americanization into said communities, the 1921 Legislature of Nebraska, keeping within the limits of the Constitution of Nebraska and of the United States, and in the exercise of police power of the state enacted Senate File 160 in the form as set out in the paragraph of the petition numbered VII.

Wherefore, defendants demand judgment dismissing the petition herein with costs, vacating the restraining order, previously granted, and for such other and further relief as may be desirable in the premises.

CLARENCE A. DAVIS,  
*Attorney General of Nebraska, Attorney  
 for Defendants Samuel R. McKelvie,  
 Clarence A. Davis, and Otto F.  
 Walter.*

24 STATE OF NEBRASKA,  
*Lancaster County, ss:*

Clarence A. Davis being first duly sworn deposes and says that he is one of the defendants in the above entitled action; that he has read the foregoing answer and believes the facts and allegations contained therein to be true.

CLARENCE A. DAVIS.

Subscribed and sworn to before me this 23rd day of July, 1921.  
 [SEAL.] FRIEDA C. BAYERLEIN,  
 Notary Public.

(Endorsed:) Filed July 26, 1921. Ethel Gossard, Clerk.

And on the same day, to-wit: On July 26th, 1921, Answer to Petition of Intervention was filed in said cause in the words and figures following, to-wit:

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO, AND OTHER STATES and DIEDRICK SIEFKEN, Plaintiffs,

vs.

SAMUEL R. MCKELVIE, CLARENCE R. DAVIS, and OTTO F. WALTER and Their Deputies, Subordinates, and Assistants, Defendants.

*Answer to Petition of Intervention.*

Defendants Samuel R. McKelvie, Clarence A. Davis, sued herein as Clarence R. Davis, and Otto F. Walter, appearing herein by their attorney, Clarence A. Davis, Attorney General of Nebraska, in answer to the petition of intervention of John Siedlik:

I.

Deny the allegations contained in the paragraph of the petition of intervention numbered VII.

II.

Deny the allegations contained in the paragraph of the petition of intervention numbered VIII, that it is impossible to instruct the children of the petitioner without using the Polish language.

III.

Deny each and every allegation contained in the paragraph of the petition of intervention numbered IX.

IV.

Deny the allegations contained in the paragraph of the petition of intervention numbered X that the children of the intervenor have been deprived of the right to receive proper instruction in a private school created and maintained in part by intervenor, and deny the allegation in said paragraph of petition of intervention numbered X that the usefulness and prestige of said school is impaired and property value thereof depreciated, and that defendants have in a substantial way and will continue to unless restrained and

enjoined deprive the intervenor of his personal rights as a citizen and of his property without due process of law to the great and irreparable injury of the intervenor, for which the law affords no adequate remedy.

Wherefore, defendants demand judgment, dismissing the petition of intervention of John Siedlik with costs against the petitioner, and for such other and further relief as may be proper in the premises.

CLARENCE A. DAVIS,

*Attorney General of Nebraska, Attorney  
for Defendants Samuel R. McKelvie,  
Clarence A. Davis, and Otto F.  
Walter.*

STATE OF NEBRASKA,

*Lancaster County, ss:*

Clarence A. Davis being first duly sworn deposes and says that he is one of the defendants in the above entitled action; that he has read the foregoing answer to the petition of intervention of John Siedlik, and believes the facts stated in said answer to be true.

CLARENCE A. DAVIS.

Subscribed in my presence and sworn to before me this 23rd day of July, 1921.

[SEAL.]

FRIEDA C. BAYERLEIN,

*Notary Public.*

(Endorsed:) Filed July 26th, 1921. Ethel Gossard, Clerk.

26 And afterwards, to-wit: On September 1st, 1921, a Reply was filed in said cause in the words and figures following, to-wit:

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, Ohio and Other States and Diederick Siefken, Plaintiffs,

vs.

SAMUEL R. MCKELVIE, CLARENCE R. DAVIS and OTTO F. WALTER, and Their Deputies, Subordinates, and Assistants, Defendants.

*Reply.*

Comes now the plaintiffs herein and for their reply to the answer filed herein by the defendants alleges and says:

1. Without controverting any of the admissions of the defendants contained in the said answer the defendants deny each and every allegation of new matter therein contained.

ALBERT & WAGNER,  
A. F. MULLEN, &  
SANDALL & WRAY,

*Attys. for Plaintiffs.*

STATE OF NEBRASKA,  
Dodge County, ss:

C. E. Sandall, being first duly sworn deposes and says that he is one of the attorneys for plaintiffs' corporation in the above entitled cause, that he has read the foregoing reply, knows the contents thereof and that the allegations contained in said reply are true.

C. E. SANDALL.

Subscribed in my presence and sworn to before me this — day of September, 1921.

\_\_\_\_\_,  
Clerk of the District Court of  
Dodge County, Nebraska.

(Endorsed:) Filed Sept. 1, 1921. Frederick W. Button, Judge.

And afterwards, to-wit: On September 24th, 1921, a Decree was entered in said cause in the words and figures following, to-wit:

27 NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF  
MISSOURI, etc., et al., Plaintiffs,  
vs.

SAMUEL R. MCKELVIE et al., Defendants.

*Decree.*

September 24, 1921.

This cause having been heretofore submitted upon the pleadings and the evidence, and taken under advisement by the Court, and the Court being now fully advised in the premises, and upon a consideration of said pleadings and evidence, finds in favor of the plaintiffs and the intervener and against the defendants.

It is, therefore, considered by the Court, that the defendants, their subordinates, deputies and successors in office be, and they are hereby forever enjoined and restrained from interfering with the plaintiff corporation, or any person or corporation similarly situated, in the giving of religious instruction in churches, private parochial and denominational schools in any language their members, or the patrons of such schools, may request or require, or with them in the giving of sufficient instruction in any language in their churches and their said schools to enable their pastors and teachers to impart religious instruction efficiently in such language to their members and pupils, and from molesting, or in any manner interfering with, the pastors or teachers giving such instruction in any language whatsoever.

To all of which findings and judgment the plaintiffs, the intervener and the defendants severally except, and are allowed 40 days to prepare and serve bill of exceptions.

By the court,

FREDERICK W. BUTTON,

Judge.



20 NEBR. DIST., EVANGEL. LUTHERAN SYNOD, ET AL. VS.

28 And on the same day, to wit, on the 22d day of October, 1921, there was filed in the office of the Clerk of said Supreme Court, a certain Bill of Exceptions in the words and figures following, to wit:

29 In the District Court of Dodge County, Nebraska, Thursday, September 1st, 1921.

Before Frederic W. Button, Judge.

NEBRASKA DISTRICT OF THE EVANGELICAL LUTHERAN SYNOD OF  
MISSOURI, OHIO, AND OTHER STATES, Plaintiff,

vs.

SAMUEL R. McKELVIE, CLARENCE R. E. DAVIS, OTTO F. WALKER,  
and Their Deputies, Subordinates, and Assistants, Defendants.

*Reporter's Transcript Record of Trial.*

Albert & Wagner,  
Sandal & Wray, and  
Arthur F. Mullen,  
Attorneys for Plaintiff.

Mason Wheeler,  
Charles S. Reed,  
Assistant Attys. Genl.,  
Attorneys for Defendants.

E. P. McDermott, and  
Guy C. Chambers,  
Appearing Amicus Curiae.

WM. E. BUTLER,  
*Reporter.*

30 Received from the attorneys for the defendant a transcript of the reporter's record of trial in the above entitled case for the purpose of examination and amendment preparatory to having same made a bill of exceptions herein.

Dated this 7 day of Oct., 1921.

ALBERT & WAGNER,  
*Of Counsel for Plaintiffs.*  
— — —,  
*Attorneys for Plaintiff.*

We at this time return the above transcript to the attorneys for the defendant and propo-e amendments to same as follows:

No amendments—a couple of corrections have been noted—  
“Wray” stricken out on page 20—“Reed” inserted—name of the wit-  
ness “Kalamaja” corrected on page 52.

Dated this 10th day of October, 1921.

ALBERT & WAGNER,  
SANDAL & WRAY,  
ARTHUR F. MULLEN,  
*Attorneys for Plaintiff.*

Amendments ordered made.  
FREDERIC W. BUTTON,  
*Judge.*

31 I, Frederic W. Button, the judge before whom this action  
was tried and determined, hereby certify that the within record  
contains all the evidence offered and given upon the trial of the case  
tains all the evidence offered and given upon the trial of the case  
here entitled by either party and all parties hereto, together with all  
objections, rulings of the court made and exceptions taken by the  
parties and, upon the application of the defendants, this record is  
made a Bill of Exceptions and the same is ordered to be made a part  
of the record herein.

Done this 13th day of Oct. 1921.

FREDERIC W. BUTTON,  
*Judge 6th Jud. Dist., Nebraska.*

32 REPORTER'S TRANSCRIPT OF RECORD OF TRIAL.

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Plaintiff's Testimony:

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Rev. C. F. Brommer.....	55	66	70	96
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Defendant's Testimony:

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33

Fremont, Dodge county, Nebraska.  
September 1st, 1921—a. m.

This action having been transferred for trial, by agreement of the parties hereto, to Fremont, in the district court of Dodge county, being called for trial on the date aforesaid, the following proceedings were had and the following testimony was adduced, as follows, viz:—

Judge Albert: Plaintiff now asks leave to amend paragraph 9 of his Petition by inserting therein by interlineation after the last word thereof as it now stands the following:—

And the plaintiff further alleges that sections 1 and 2 of said act are unconstitutional and void for the further reason that the provisions thereof nor any of them are embraced or included in the title of said act.

Mr. Wheeler: That is an entirely novel proposition to us, but we are ready to meet it now, and within the judgment of the court it may be amended.

(Same amended.)

Mr. Mullen: Intervenor asks permission to amend section 9 of the Petition of intervention by adding this same amendment asked by the plaintiff.

Court: You may do so.

Judge Albert: Plaintiff also asks permission to file his Reply as a general denial. It has been dictated and will be filed.

(No objection. Same filed.)

Rev. HENRY ERCK, being called on part of plaintiff, sworn and examined, testified as follows, viz:—

34 Examined by Judge I. N. Albert:

1 Q. Where do you live?

A. At Lea, Colfax County.

2 Q. How old are you?

A. Forty years old.

3 Q. What is your business or occupation?

A. I am a pastor, minister of the gospel.

4 Q. Of what denomination?

A. Nebraska District of the Evangelical Lutheran Synod of Missouri, Ohio and other states.

5 Q. How long have you been engaged in the work of the ministry?

A. For eighteen years.

6 Q. Aside from the ordinary duties of a minister, have you any other duties, in connection with them?

A. None.

Court: With schools?

7 A. If you consider that something aside from the ministry, I might say yes.

8 Q. What I am getting at is this: I believe you, your church or congregation, maintain a parochial school, too, in your pastorate?

A. Yes.

9 Q. Have you any duties with reference to the school?

A. Yes. I am supposed to supervise that school.

10 Q. Do you hold any office in the Evangelical Lutheran Church aside from that of being one of the pastors?

A. Yes sir.

11 Q. What is that?

A. I am a member of the Advisory Board of the Nebraska district.

35 12 Q. How long have you held that office?

A. About three years, I think.

13 Q. You may state whether you are familiar with the general object of this Synod?

A. Yes.

14 Q. What is it?

A. To preach the gospel.

15 Q. And to preach the gospel, of course, strictly speaking, means I suppose, to spread the gospel?

A. Yes.

16 Q. Are you engaged to any extent in missionary work?

A. Yes sir.

17 Q. In this State?

A. Yes.

18 Q. Among what class of people?

A. Well, among Americans; among people of German descent and, also, Russian extraction, immigrants.

19 Q. Are you acquainted with the situation, where this missionary work is conducted, as to the ability of the people whom you are teaching to read and understand English in religious matters?

A. That is a difficult question.

20 Q. Are there a considerable number of them who are not sufficiently informed in English to understand religious teaching in that tongue?

A. Yes sir.

21 Q. There are Russians who have been brought in to work in the beet fields of the State, I think.

A. Yes.

— Q. They are recent immigrants to this country?

36 A. Yes, sir.

22 Q. Now going back to the schools of your church conducted in this State: Have you had an opportunity to observe and examine their courses of study, the curriculum?

A. Yes, sir.

23 Q. Have you ever had any opportunity or occasion to compare that course of study or curriculum with the course of study prescribed by law for the common schools?

A. Yes, sir.

24 Q. And to compare it with the course of study, curriculum, pursued in the public scholls.

A. Yes sir.

25 Q. Are you able to form an opinion as to how your schools of your church will compare with the public schoolz as to the secular branches taught and as to the efficiency with which they are taught in your schools?

A. Yes.

26 Q. You may state what your observation and comparison has been along those lines?

A. I consider them fully equal to the public schools.

27 Q. Is the course of study the same.

A. Yes sir.

28 Q. And in efficiency, your judgment is they are equal to the public schools.

A. Yes, sir; not only in my judgment, but I can bring figures.

29 Q. You have been engaged in teaching yourself, I believe?

A. I have some.

30 Q. In your official character you have had opportunities, and it has been a part of your duty to observe these things?

37 A. Yes, sir.

31 Q. Among the branches in your own schools, generally speaking, in this state, you teach the German language, I think.

A. We have done that.

32 Q. That has been a part of your policy and plan?

A. Yes.

33 Q. Now state to the court what reason, if any, you have for including German in the course of study in your schools?

A. We do that in order to enable the children to worship with their parents at home and in the church.

34 Q. Why could they not engage in devotional exercises and worship with their parents, if they did not understand English? Why could they not do that in English, I mean.

Court: That is, if they did not understand German.

A. That would destroy congregational worship; also family worship.

35 Q. State to the court whether there are a large part of your parishioners, members of your church, who are rural people and who are unable to speak the English language accurately?

A. I might say that our schools are conducted by the church for the sole purpose of doing the work of the church. As I have said before, the purpose of our synod is the spreading of the gospel. We are to teach the gospel to both young and old, or, in the words of the Master, to all creeds. If you will look in on the congregation Sunday morning, you will find children in the church. These children are American children; they are able to use the English language; they speak English; they play in English. And when they grow up, they will do their business in English; they will make love in English, and raise their own children in English. If none

38 but the children were affected by this legislation, we would not have much practical reason to appear here as plaintiff.

But we say also this: That at the time when this present generation of children have reached the age of majority, so that they have obtained voices in the re-establishment of the church, there will be English in the church, and in the services also there will be the English language. If you will look in the church on Sunday morning, you will find their grzndfathers and grandmothers, their fathers and mothers. All the grandfathers and grandmothers, we may truly say, or nearly all, have been immigrants to this country—to the greatest extent coming from Germany. They have been schooled in the German language. They have settled on farms here in the State of Nebraska; have established a German congregation, and have their services in the German language. For these people, it is practically impossible to follow and be properly edified by an English service. The present generation of fathers and mothers are such as who have been born in Europe in part, and to a large extent in Germany. They have received their schooling in secular matters here in the English language; as far as business is concerned, they are pretty well versed in English. But for the reason that they have received their early religious education at the knees of their mothers and women in the German language, and also from their pastors at that time, in the German language, in matters of religion the language of their hearts is the German language, they are at the present time not able to receive proper edification exclusively in the English language. If this law is enforced, it will have this effect: that in religious matters the children will be alienated from their parents and grandparents. In religious mat-

39      ters, the family and the church will be divided. If the present generation of children is not—have some religious knowledge in the German language, in addition to religious knowledge in the English language, each congregation will consist of two congregations—a German section and an English section. Henceforth, the children, the parents and grandparents will not be able to worship in one service. Nor will the father and the pious mother be able to correct a wayward child if the child does not learn and understand the German language—the only language in which its parents can effectually admonish it. What the church needs now is, permission for parochial instruction in religious matters in German. Her children are English, and, as soon as they obtain a voice in the re-establishment of the church, the services will be conducted in English. Love for our children, and concern for their good and welfare, prompts us to instruct them in religious matters; and but few of the present sisters in the congregation feel that the children do not need also some instruction in the German language, or the foreign language of their parents, in religious matters, in order to keep up the natural bonds that exist between children and parents and grandparents and not have them severed.

36 Q. I believe it is one of the practices of your church, and one of the duties enjoined on your children, to conduct devotions in the home?

A. Yes, sir.

37 Q. In which all participate?

A. Yes.

38 Q. I believe they are conducted evenings and mornings?

A. Yes.

39 Q. And those devotions are generally conducted by the father of the house, or by the mother, if he is absent; and all join and participate in the family worship.

A. Yes sir.

40 Q. Where the parents do not understand the English language sufficiently well to talk intelligently on religious matters, then the effect of this family devotion, these devotional exercises in the family, will be lost either on the parents or children, if the children do not understand the German language, or the language of their parents?

Ans. Yes, sir.

Mr. Wheeler: That is objected to as leading and suggestive.

Court: Objection overruled. It has been answered.

Mr. Wheeler: I move that the answer be stricken out so that I can make the objection.

(Stricken out.)

Mr. Wheeler: I renew the objection.

(Objection overruled. Defendants except.)

41 Q. Is the practice of family worship quite universal among your members?

A. Yes, sir; it is.

42 Q. You may state whether or not the prestige and standing of your schools would in your opinion be to any extent affected injuriously by the enforcement of this law?

Mr. Wheeler: Objected to as incompetent, immaterial and irrelevant.

(Objection sustained. Plaintiffs excepts.)

43 Q. You may state whether or not in your opinion, and from your knowledge of the affairs of your church and the schools, the elimination of the German language from the curriculum of your schools would affect the prestige or standing of your schools?

Same objection. Overruled. Defendant- excepts.

A. It may to some extent.

41 44 Q. In your judgment, would it affect the attendance, the enrollment, of your schools? to any extent?

A. It might.

45 Q. All other things being equal, would it not affect the attendance?

Defendants objects as leading and suggestive.

46 Q. All other things remaining the same, would it not affect the attendance?

A. I think it would.

47 Q. You may state whether or not there are any pupils attending your schools who are not members of your church?

A. There are in certain localities.

48 Q. State if you know why they attend your schools?

A. Some have come for the very purpose of learning another language.

49 Q. In your experience as a teacher, whom is the age, the apt age, the best age, to teach a child language? In early life or later?

A. In early life, of course.

50 Q. Speak by grades. Would you say it would be during their school study in the grades below the 9th, or after that.

A. In the grades below the 9th.

51 Q. You may state whether or not, in your judgment, the study of a foreign language injuriously affects the study of the English language by the same child.

A. I cannot see why it should.

52 Q. But if you eliminated, or your church eliminated the study of the German language from your schools by children below the 9th grade, and the study of all secular branches in any language other than English in your schools, would that have any effect on your missionary work?

42 A. I think it would indeed.

53 Q. Explain to the court how it would affect the missionary work in your church?

A. Our missionaries do work in more languages than one. In order to do that, they must be able to use different languages. In order to use different languages, they must learn them. As we have heard, the best time to learn them is during the school age. Our candidates for the ministry are, to the greatest extent, drawn from parochial schools, church schools, where we have been enabled to speak and use more than one language. So in case we send a missionary to Brazil to work among those who have emigrated there and who use the German language, they are able to carry on their work successfully. The same is true of Argentina.

54 A. You send some missionaries to Germany?

A. Yes, lower Alsace and Lorraine. (Lorraine)

55 Q. In Prussia, there is a Lutheran Church supported by the State, or is there not.

A. That is not the Lutheran Evangelical Church. It is a combination of the Lutheran and the reformed church. That is not our church.

56 Q. Has your church ever been the established church of Germany?

A. No sir.

57 Q. Have your missionaries in the past been welcome in Germany by the government.

A. I don't think so.



58 Q. In other words, there is not the most friendly feeling in or between your church, and the established church of Germany?

A. Absolutely not.

Judge Albert: Now I think Mr. Sandal or Mr. Mullen would like to ask some questions.

43 Questions by Mr. Mullen:

59 Q. Now in regard to this matter of giving religious instruction and training in the Lutheran Church; what in a general way are the duties of a parent with reference to his obligation to give this instruction?

Q. It is the duty of a parent, as far as the home is concerned, to follow the injunction of St. Paul to the Ephesians to bring up children in the culture and admonition of the Lord. From that springs the establishment of the church school.

60 Q. The prime purpose, as I understand it in conducting these schools, is to use them as a basis to support and help the parent give religious instruction to children?

A. Yes.

61 Q. That is the basic purpose of the parochial school to help the mothers and fathers and grand parents that speak the German language teach religion and morals. Could these parents correctly engage to do this without the use of the German language.

Defendants object as leading and suggestive and immaterial. Objection overruled. Defendants except.

A. No sir.

62 Q. Now you have certain sacraments that must be administered at different stages of a child's growth?

A. Yes.

63 Q. First communion and confirmation?

A. Yes.

64 Q. Are there some educational requirements in matters of religion before the child can take first communion?

A. Yes sir.

65 Q. Does that apply to confirmation?

A. Yes.

44 66 Q. Whose duty is it to know whether the child is qualified to be confirmed.

Q. It is the duty of the pastor and the parent.

67 Q. Is it necessary for the parent to know that fact?

A. The parent ought to know that.

68 Q. A German mother, could she understand whether the child was qualified or not without she had a German education.

A. No, sir.

69 Q. Or the father, either one.

A. No, sir.

Court: Do you contend, Mr. Mullen, that section 4 of this act precludes preaching in a foreign language, or the later act.

*Court:* Yes, if you apply it in its broad application, In its broad application, it probably prevents the use of German in the school.

Questions by Judge Albert:

70 Q. At what age are children usually confirmed in your church?

A. About 15, 14, some 15.

71 Q. Speaking of grade schools, about what grade?

A. 7th and 8th on an average.

72 Q. Generally speaking, assuming they have attended grade schools and received proper instruction, they would be confirmed before they had entered the 9th grade—generally speaking.

A. Yes, sir.

Questions by Mr. Mullen:

73 Q. The first communion when does that take place?

A. At the time of the confirmation.

74 Q. On the confirmation day?

A. Yes, sir.

45 Cross-examination.

By Mr. Wheeler:

75 Q. You are an officer of the plaintiff's Synod?

A. An officer of the Nebraska District of the Evangelical Lutheran Synod of Missouri, Ohio and other States.

76 Q. Isn't the name the Nebraska District of the German Lutheran Evangelical Synod?

A. No, sir.

77 Q. You testified I believe, if I have you correctly, that the best age to teach children languages is when that child is underneath the 9th Grade.

A. Yes, sir.

78 Q. And the reason for that is that the child retains the impression of the first language it learns?

A. I am not prepared to say yes or no to that.

79 Q. Did you ever know of a man who learned a foreign language after he passed the 9th grade that did not speak it with an accent.

A. I don't see why a person could not do that.

80 Q. Did you ever know of such a person in your experience as a language teacher.

A. I am not able to point to a specific instance just now.

81 Q. Were you born in this country?

A. Yes, sir. So were my parents.

82 Q. You speak German?

A. Yes.

83 Q. When did you acquire your knowledge of German?

A. As a child.

84 Q. At what age, sir?

A. I acquired it in the home and in the school.

46 85 Q. At what age did you acquire it in school?

Q. I went to school ever since I have remembrance; say six or seven years old.

86 Q. At what age did you commence the study of German in school?

A. I suppose at the same time.

87 Q. What time was that?

A. About six or seven years old.

88 Q. You have testified I believe that the parochial schools maintained by your Synod are the equal of the public schools?

A. Yes, sir.

89 Q. Would you say that of your school at Scotts Bluff, Minatare?

A. I consider the conditions under which the people live there who send their children to these schools is such that it is very difficult to class that school with the average school.

90 Q. How about Bayard?

A. I cannot say about that. That is Russian, I think, and the same condition applies there as at Scotts Bluff.

91 Q. You did not take the western schools into consideration when you replied that the parochial schools were the equal of the public schools?

A. I would like to give you some statistics in answering that question on the state of our schools in the State, if you will allow me.

92 Q. I would rather you would not volunteer them right now.

A. I don't know how to answer your question, because of the peculiar conditions I said I could not class them as a real school.

93 Q. From your experience, can you give the percentage of the number of your parishioners or communicants who are unable to understand English? Can you give a rough estimate?

47 A. A rough estimate of the number of communicants unable to understand English at all?

Court: In Minatare.

A. It is a difficult matter to figure it in numbers.

94 Q. Can you give any rough estimate.

A. Why, to be conservative, I would say 10%.

95 Q. In rough numbers then, 10% of the parishioners of the Evangelical Lutheran Synod do not have sufficient knowledge of the English language to comprehend religious exercises? Is that a fair estimate.

A. Yes, sir.

96 Q. Now is this 10% composed of young men of old men?

A. Old men and old women.

97 Q. They are not the recent arrivals then?

A. No sir.

98 Q. They are the older people?

A. Yes, sir.

99 Q. Has your organization ever made any attempt to teach the older people English?

A. No, sir.

100 Q. You have confined your efforts to teaching the young people German rather than the older people English? Is that correct.

A. Yes.

101 Q. I suppose it is easier and simpler to teach German to the young than to teach the older people English.

A. Indeed it is.

102 Q. That is why you have adopted that policy.

A. Yes.

103 Q. I believe you also stated that if this foreign language law was enforced, its effect would be to alienate the children from the parents in religious matters.

A. Yes sir.

48 104 Q. In giving that answer, you assume that the foreign language prohibited religious services in German or any other language but English did you not?

A. No, I did not presume that.

#### Questions by Mr. Reed:

You stated that the general purpose of the parochial schools was to teach religion, did you not.

A. Yes sir.

105 Q. Is that a greater purpose than the purpose of giving an education to a child.

A. It is the purpose of our schools to give the children a christian education; also their secular education from the christian standpoint.

106 Q. Then repeating the same question, can you say that the teaching of religion is the major purpose of the parochial school as compared with the purpose of giving an education to the child to make a living?

A. I would not like to say that. I could qualify my answer by saying we arrange our schools to be a help to the public school in secular matters, and, in addition to this, we give them the necessary religious instruction.

107 Q. Do you give them that in the same length of time that the public schools give a purely secular education; do you people accomplish this in the same time?

A. Many of our schools put in more time than the public schools do.

108 Q. Are you familiar with the curriculum of the public schools?

A. To some extent.

109 Q. Upon what do you base your declaration that the parochial schools are equal to the public schools.

49 A. I have children of my own and in my parish who attend the church schools and from there go to the public school. Likewise, children who have attended the public school before they attended the church school. And I find that as to age the children are equal.

110 Q. You are what is known as an educator?

A. I am a minister of the gospel. I am no more doing practical teaching in the school.

111 Q. Then you would regard your opinion concerning the efficiency of the schools purely as your personal view and not your view as an educator?

A. No, sir. I have gathered statistics.

112 Q. Can you give me the required curriculum of the public schools?

A. I cannot at present do that.

Mr. Mullen: I don't think any of us can.

A. I don't think anybody can.

113 Q. Do your parochial schools maintain patriotic exercises?

A. Yes, sir.

114 Q. What sort of length of time is devoted each day to them, in rough numbers.

A. I cannot say. I cannot specify what time.

115 Q. Will you give me any of the patriotic exercises carried on by the most of the parochial schools.

A. Our children are taught U. S. History, and they are taught the national hymns.

116 Q. Anything in addition to that?

A. They undoubtedly receive some notification of the importance of Washington and Lincoln and their birthdays, and matters like that.

117 Q. You are certain they receive that information?

A. I am quite sure.

50 118 Q. Can you repeat the national Anthem?

A. I think I can.

119 Q. Do you think a majority of the graduates of the parochial schools maintained by your Synod can repeat the national anthem?

A. Sure they can.

Court: Probably beat us in that. They can repeat it in two languages.

120 Q. You are familiar with the parochial schools of Scotts Bluff county, are you not?

A. I am not the man who handled that particular case. I would rather have somebody else testify in that case. I am familiar only in a general way, not in details.

121 Q. You stated in your direct examination that the peculiarities of the schools of Minatare and Scotts Bluff were due to the peculiar parentage of the children who attended those parochial schools did you not.

A. Yes, sir.

122 Q. Don't a great many of the children of similar parents attend the public schools of Scotts Bluff county?

A. I suppose they do.

Questions by Mr. Wheeler:

123 Q. The 10% of your parishioners who are unable to speak English are the older people?

A. Yes.

124 Q. Parents or grand parents?

A. Mostly the grand parents, some parents.

125 Q. There is nothing to prevent the parents instructing the grand parents in the English Language?

A. The parents are not sufficiently able to use the English language to furnish that instruction.

51 126 Q. Then you didn't say 10% who were unable to understand English were grand parents?

A. I did not confine it to the grand parents.

127 Q. I believe you said German was the language of the heart of your parishioners? Did I understand you correctly?

A. Not with all.

128 Q. With many of them?

A. It is to a large extent with those who received their training in that language.

129 Q. Have you any doctrine in your Synod that cannot be expressed in English?

A. No, sir.

130 Q. If you continue to teach children German in order that they may communicate with their German parents, you will have a perpetual system of engrafting German on all of your parishioners, will you not?

A. I don't think it will work out that way as I have testified before the language of the children is English. All their secular instruction is given in English, and to a large extent religious instruction is given in English, and you will find when they reach majority they will desire and want the services in the church to be conducted in English. I maintain for the present time, in order to keep the children from being severed from their parents, in religious matters, they ought to have the rudiments of German taught for the purpose of receiving some religious instruction.

131 Q. Are your schools actually teaching German to children under the 9th Grade now at the present time.

A. I could not point out one that has taught it since this last law was enacted.

132 Q. That is, I mean actually teaching it at the time the Simon's law was in effect.

52 A. After the opinion of the State Supreme Court, which permitted the use of another language outside of school hours, that was done.

133 Q. Only outside of school house, I suppose.

A. Yes, sir.

134 Q. Are your parochial schools progressive? Is the attendance increasing? Are they a successful institution at the present time?

A. Yes sir.

135 Q. And you have more students this year than last year.

A. I am not able to say off hand. I will have to compare the statistics.

136 Q. Has there been any decrease in attendance.

A. If there has, it has not been great, such as to draw particular attention.

137 Q. How about the year before.

A. I am not able to answer correctly.

138 Q. You cannot say that the attendance of the schools has been diminished because they complied with the foreign language law, can you?

A. I think I can.

139 Q. You have not as many pupils in attendance you think? You have had as large attendance as you had before the foreign language law went into effect.

A. I am not able to give statistics in thzt respect. But I consider the word "prestige" in some that a different light. Perhaps, looking at it only from numbers.

Redirect examination.

By Judge Albert:

140 Q. Whzt are the peculiar conditions you refer to in Scotts Bluff and Minatare.

53 A. Our work at Scotts Bluff and Minatare is mostly missionary work amo-g recent immigrants from Russia. These people work in the beet fields from Spring until late in the fall. I understand they do not get back in the city until approximately the 1st of November, and then leave the city to get out there to their work about in April. So the children flock in there about the 1st of November in large numbers, and leave in equally large numbers in April. So a school conducted under such conditions has not a fair chance to work upon the children.

141 Q. Can those children, as a rule, speak English and their parents?

A. Their parents? Hardly; at least very little.

142 Q. You do not maintain any schools for grown-up people, as a rule?

A. We have the church and a normal and a seminary. We have schools in which our religious workers are trained.

143 Q. You do not open the schools for your parishioners generally past the age of twenty-one?

A. No. We do not consider that church work.

144 Q. Speaking about your exercises. Do you have patriotic exercises in your schools?

A. Yes, sir.

145 Q. Athletic exercises, etc.

A. Yes.

146 Q. Have your schools opened with prayers in the morning?

A. Yes sir.

147 Q. I suppose like most churches you ask God to protect certain disnitararies of the country—the president?

A. We are taught to pray for the government, and teach the children to pray for the government.

148 Q. Do you sing the national airs of any other country in your schools?

A. No, sir.

54 149 Q. Speaking about the work of education old people in the language. Generally speaking, they don't have time to take the time to take lessons in English or any other language, do they?

A. No, sir.

150 Court: You spoke of having U. S. history. Do you have civil government?

A. Yes, sir.

Questions by Mr. Mullen:

151 Q. You spoke of some statistics you have. Have you those here available, so you can give them in evidence?

A. Yes.

152 Q. What do they consist of ordinarily?

A. It is in regard to the qualifications of the teachers and the efficiency of the schools.

153 Q. Produce those, please.

A. (Same produced to counsel.) I have been asked to gather up statistics in these matters recently. I can offer some in the following numbers: We have 109 schools in the State. The reports I have come from 90.

154 Q. From ninety of those schools.

A. Yes, sir.

Professional life.....	67
1st Grade State Certificate.....	15
2nd Grade " ".....	1
1st Grade County ".....	3
County Permit held up.....	1
High School experience.....	1
High School, city and State.....	2

8th grade examination in the past two years shows following results:

Year ago 159 children took examination. 127 passed, Average 79 percent plus. Last spring 223 took examination, that is, the children, and 188 passed. Average 84 percent plus.

55 155 Q. These are certificates referred to in the State?

A. Yes.

156 Q. The same as used in the public schools?

A. Yes.

157 Q. Do your teachers have certificates?

A. Yes; they must have.

158 Q. Are your schools as a rule substantially equivalent to the public schools in the same vicinity?

A. Yes, sir.



## Redirect examination.

By Judge Albert:

159 Q. As a man who has been acquainted with educational work, and experienced along educational lines, on the percentage you have given of those who have passed examinations and those who have not, would you say that was a high, low or an average?

A. I think it is a very good average.

By Mr Mullen:

160 Q. Does it average with the public schools in the same vicinity, as far as you know?

A. I cannot state definitely; but, as a matter of hearsay, I believe the report of 50 of the public school children passing the 8th Grade examination is a good average.

By Judge Albert:

161 Q. Taking your experience and knowledge in your line of all institutions, you say that is a good average.

A. Yes, sir.

Witness excused.

C. F. BROMMER, being called by the plaintiff, sworn and examined, testified as follows, viz:

Examined by Judge Albert:

162 Q. How old are you?

56 A. Fifty-one years old.

163 Q. Where do you reside?

A. Hampton, Nebraska, near Hampton, Nebraska.

164 Q. In what business or occupation are you engaged?

A. Minister of the Gospel.

165 Q. In what denomination?

A. In the Evangelical Lutheran Church of Missouri, Ohio and other states; Nebraska District.

166 Q. That is the plaintiff in this action?

A. Yes, sir.

167 Q. Does your church maintain a school at Hampton, or near there?

A. Yes sir.

168 Q. Do your duties as a pastor relate somewhat, to some extent at least, to that school?

A. Yes, sir.

169 Q. In what way?

Q. Well, the pastor is the pastor of all the people, of all the souls entrusted to him, and the children also. He is to supervise the schools.

170 Q. What is the general purpose of maintaining those schools, your school and other schools of like character?

A. It is the purpose to give the children religious instruction.

171 Q. That is the primary purpose?

A. The only purpose, you might say.

172 Q. But in connection with that, you also give them religious instruction.

A. Yes, sir.

173 Q. And that secular instruction is in the branches required by law to be taught in the public schools of the State.

37 A. Yes, sir.

174 Q. The same course of study?

A. The same course of study.

175 Q. In addition to teaching the secular branches required by law and giving religious instruction, it has been the custom of your school to teach and use the German language in regard to all those things, including those below the 9th Grade.

A. Yes, sir.

176 Q. Aside from the culture or educational value of teaching the German language, what was the purpose of the church, if any for having the German language a part of the curriculum of these schools?

Mr. Wheeler: That is objected to as immaterial.

Objection overruled. Defendants except.

A. To enable the children to partake in devotional exercises at home of the parents and attend services understandingly with their parents who are not able to attend with the greatest benefit English services.

177 Q. May I ask why it was not possible for them to participate in these exercises in the English language.

A. We have quite a number of children in our congregations we may say in the country. We have mostly a rural congregation who do know enough English for every day uses, you may call it, but who could not follow an English sermon understandingly; and to enable the children to attend our services with their parents we thought they should know enough or so much of German as to know themselves and understand and give themselves to God.

178 Q. In your schools I suppose you teach the catechism?

A. Yes.

38 179 Q. And that is made a part of the preparatory education of the children for confirmation in your church, is it not?

A. Yes.

180 Q. Knowledge of that?

A. Yes, sir.

181 Q. Your church I suppose, as all christian organizations do, enjoin upon the children, or upon the parents, certain duties with respect to their children?

A. Yes, sir.

182 Q. And among them is the duty to instruct and admonish children *in* matters of faith and religion, is it not.

A. Yes, and teach them the word of God.

183 Q. Then I would judge from your testimony that it is a part of the duty of the parents of children in your church to co-operate with the pastor and the school in the preparation of children for their entrance into the church.

A. Yes, sir.

184 Q. As a pastor, I would ask you whether a parent who has received his religious training in the German tongue—speaking generally—the ability, would he be able to impart intelligently the religious instruction necessary to co-operate with the school and the pastor in the preparation of children to join the church.

Mr. Wheeler: The defendants object to that as incompetent, immaterial, irrelevant, calling for the conclusion of the witness.

Objection sustained. Plaintiff excepts.

185 Q. I understood you to say that a large percentage, or quite a percentage of the membership of your church in the State of Nebraska, while they would have a knowledge of the English language sufficient for every day purposes, do not have any of it in respect to religious matters, or sufficient knowledge of it in order  
59 to impart religious instruction in that tongue?

A. No. May I explain it?

186 Q. Yes. As I understand your purpose in teaching the children the German language is, in order that the children of such parents may receive instruction in the catechism and their training in the church in the language which both understand.

A. Yes, sir.

187 Q. Have you had any experience in undertaking to impart or converse with members of your church who had been educated in religion in the German language; have you ever undertaken to talk with them about religious matters in the English tongue?

A. Yes, sir.

188 Q. Is it easy? State whether or not you find any difficulty in having your minds meet in that language?

A. How do you mean it? Do you mean if I could make them understand a biblical truth in English as well as in German?

189 Q. Yes.

A. Some of them I could not.

190 Q. Your local congregations are governed by a local board, I believe.

A. They are self-governing.

191 Q. And have to act through a board of trustees?

A. Yes.

192 Q. And the pastor is ex officio chairman of the board is he not.

A. Yes.

193 Q. Now in your church in this State, the support of your schools comes in the way of voluntary contributions from your membership?

A. Yes.

194 Q. You may state from what class of people the principal part of these contributions come? The older men, heads of family or the young people?

A. Well, from the heads of family.

195 Q. Who occupy the official positions in these local boards?

A. Usually the elderly men who have families.

196 Q. State whether or not there is quite a percentage of the membership of these local boards who have received their church education in the German language.

A. I think they are about the average of the congregation, that all the congregation has.

197 Q. You may state whether or not those men would be able to participate intelligently in the conduct of the business affairs of the congregation in the English language?

A. I do as a rule. As a rule, I think they could all participate in the business transactions in the English language.

198 Q. But in the use of ecclesiastical terms, theological terms, would they be able to do that.

A. Many of them would not.

199 Q. Would they be able to read a record of the preceding meeting in the English language.

A. Is it of the congregation?

200 Q. I mean the business of the congregation?

A. Oh, yes, sir.

201 Q. Most of them would be able to do that?

A. Yes.

202 Q. Some would not be able to read it in English?

A. Yes, there would be some who could not.

203 Q. They would not as readily grasp the record of a proceeding in English in many cases as they would in German?

A. Some would not.

204 Q. Your children are prepared for the first communion along sometime before they would enter the 9th Grade.

A. As a rule.

205 Q. And they undergo a course of preparation for that event in their religious lives.

A. Yes, sir.

206 Q. Who prepares them for that ordinance?

A. The pastor.

207 Q. Who, if any one, is supposed to co-operate with him?

A. The congregation by prayer and the parents by practical instruction.

208 Q. It is the duty, one of the duties of the parents, to help, assist, explain and admonish?

A. Yes; help along.

209 Q. Do the parents as a rule take any interest in that event.

A. Yes, sir; they surely do.

210 Q. It is quite a day is it not in the church when a class takes its first communion.

A. Yes, sir.

211 Q. Now, then, you have special services on that occasion. It is a special occasion?

A. Yes.

212 Q. Could all the members, all the parents and members, and the children, participate intelligently in that service if it were conducted in the English tongue exclusively?

A. No, sir.

213 Q. Would there be a considerable percentage of them who could not?

A. Well, it is different. There are some congregations in the cities where it would not make any difference hardly, but some; in the country, there would be a large percentage of them who could not with benefit follow the discourse.

62 214 Q. That would be true especially with the mothers?

A. Yes; more so than with the fathers.

215 Q. You may state whether or not you have knowledge of the policy of your church in the State of Nebraska in respect to the use of the English language in the present and future?

A. As we look at it, the church -as no business at all to teach any language. The business of the church is to preach the gospel as Christ commissioned the church, as nearly as we can, without English. The church must employ a language, and the decision rests with the church what language to employ in order to attain its ends.

216 Q. There is a gradual growth, is there not, in the use of the English language in your church?

A. Indeed there is.

217 Q. It is a part of the policy of the church to encourage the members to eliminate, as rapidly as possible, all other languages.

218 Q. We do not retard it or push it. We let it take its natural process as far as we can. It is painful work for pastor and congregation to use both languages. We let the language question take its natural process. In course of time we will. But we have not arrived at such a situation that we could only use one language.

219 Q. I mean is there any policy in your church to exalt the German language above the English?

A. No.

220 Q. Is it not the policy of the church to encourage the use of the English language and make it eventually the language of the church?

A. That is what we are working upon.

221 Q. You may state to the court the general programme of your parochial schools, beginning with the opening of school, etc?

63 A. We open school with the beginning of a hymn and a prayer in which all children participate. Then we have from forty five to fifty minutes, maybe half an hour, of religious instruction, including the recitation of bible passages which the children have learned. Then we have a stated course of study in our schools and to my knowledge have the same studies as the public schools have.

222 Q. You say singing of a hymn and a prayer at the opening?

A. Yes.

223 Q. Who are the objects of your petitions when you open your school with prayer.

224 Q. We thank God that he has mercifully protected us the night before and ask Him to Keep us from doing wrong, giving us power to do His will, and then the Lord's prayer which concludes our prayer.

225 Q. I mean in your devotions is there the element of patriotism and love of country?

A. Certainly.

226 Q. You have flag exercises?

A. Yes, sir.

227 Q. They are a part of the programme of the school?

A. Yes, sir.

228 Q. You have heard some testimony here and discussion about the conditions prevalent at Scotts Bluff and Minatare, this State, in the parochial schools there, have you not?

A. Yes, sir.

229 Q. Are the Russians, who have been mentioned as beet-field workers there, permanently located, or are they a floating population?

A. It is mostly a floating population.

230 Q. And the children who attended school last year, if not this year, think you a large number will be away and a new set will be in your schools next year?

A. As a rule.

231 Q. Then your church does not have these children  
64 from the time they are fit to go to school until they graduate, but generally have them about a year.

A. Of course we have some of them; but the majority of them we have not during all the school year.

232 Q. They are floating attendants?

A. Yes.

233 Q. The parents of those children are Russian immigrants?

A. Yes.

234 Q. And some of the children themselves have been born in Russia.

A. Yes; very many of them.

235 Q. And they do not speak the English language in their homes?

A. Not the parent. I have worked among them formerly, but not in the last ten years. At that time they very seldom spoke the English language. They were not able to. Emigration has stopped from Russia about twenty five years ago, and then the German-Russian set in. They have not been here since the other Germans. But, as far as I know, the language of the home, at least of these German-Russians living in the country, is German. With those in the city, some of them, it is English.

236 Q. Their devotions are in the German language.

A. Yes.

237 Q. And it is spoken in the churches?

A. Yes.

238 Q. The old folks could not understand religion preached to them in any other tongue.

A. No.

239 Q. Would it be possible for a missionary to work effectually among these people with the use of the English language exclusively?

A. Would it be possible to teach the children under the 9th Grade?

240 Q. Yes, with the use of the English language perhaps effectually.

65 A. Well, you can teach children.

241 Q. I say could you make it a success? Would it be effectual?

A. In the course of time, but I think a good deal of time would be necessary.

242 Q. Yes. A man might die in time and he might need something else.

A. Not at the beginning.

243 Q. Would it be possible to conduct these schools from your standpoint and train them in matters of faith easily without the use of the German language.

A. No, sir. You could not well do it.

244 Q. Could you prepare children for their communion without the use of that language properly?

A. Not as they are.

245 Q. You would have no help or support effectually with the parents in preparing them for that without the use of the German language?

A. No, sir; they could not assist.

246 Q. Those schools have been more or less interfered with out there, their usefulness?

A. The only school we had trouble with, that has been closed down.

247 Q. That is the one at Scotts Bluff?

A. Yes.

(At this juncture court took a recess until 2 o'clock P. M., at which time court called and the direct examination of Rev. Brummer was proceeded with, as follows, viz:

248 Q. From your knowledge of the schools of your church in this State, are you able to say whether the elimination of the use and the teaching of German in your schools would effect the standing or prestige of the schools, the attendance of them?

A. I think it would the attendance in many cases.

249 Q. Are you able to say whether it would operate to keep away pupils who would otherwise attend the schools.

66 A. Well, I suppose it might a number of pupils who attend the school in order to learn the German language, and no

doubt they would not attend any more if they would be prohibited from learning German.

250 Q. Of these pupils, the attendance at present and prospective, a large number of those would want to attend your school in order to take up German before they passed into the 9th Grade?

A. Yes, sir.

Cross-examination.

By Mr. Wheeler:

251 Q. You have a separate congregation, a separate school which you have charge of, or is your work as general supervisory officer of the Synod?

A. Both.

252 Q. How many communicants do you have in your parish?

A. Members?

253 Q. Yes.

A. About three hundred.

254 Q. You know them all individually?

A. Yes, sir.

255 Q. What language do you preach in there?

A. In German and English.

256 Q. How much German and how much English; what part in German and what part in English?

A. We have had so far four months' German and one English, but certain conditions will not allow me and at present we have more English, but the time is taken up with other matters or work, and it is impossible to serve the congregation.

257 Q. Does the Synod attempt to regulate the language you use in religious exercises?

A. Not at all.

258 Q. That is left to you entirely?

A. It is left to each individual congregation.

259 Q. You are head of the parochial school also?

A. Supervisory officer.

260 Q. How many students do you have in your school, or did you have last year.

A. In ours, I think ninety or ninety two, might have a few less or more, say ninety. Two schools.

261 Q. How many did you have the previous year?

A. One hundred, but a number of them have been confirmed and there are not so many as will be soon.

262 Q. Are you making any improvements in your school, physical improvements?

A. In regard to equipment?

263 Q. A. Yes.

A. We try to keep them in first class order.

264 Q. You testified I believe that there were a number of your parishioners who know enough English to take part in business



transactions, but not enough to take part in religious transactions. Is that correct?

A. Yes, sir.

265 Q. Why? How do you account for that.

A. There are certain expressions used in a sermon, for instance, which we do not use in every day conversation. Take, for instance, sanctification, transfiguration, the Trinity, the atonement, perhaps, in the person of Christ. There are very many expressions used in a sermon which are not used in every day life conversation

68 which they would not understand.

266 Q. These men pick up English in business transactions?

A. Yes, sir.

267 Q. If there were more English used in the church, would they not pick up the English language just as they have picked up the English in business?

A. Well, they might.

268 Q. How many of your people in number 300 do not understand enough English to take part in English in the religious exercises?

A. I could not say.

269 Q. Approximately.

A. Well, I would say 10 to 20%.

270 Q. Are they the young or the old people?

A. The old people. We have two widows of civil war veterans who never in their lives have learned to understand an English sermon.

271 Q. Have you any members of your congregation who do not understand enough German to take part in German religious exercises?

A. No, sir; not that I know of. The younger people learn to understand the English language, one language as well as the other—that is, the younger people.

272 Q. But every one of your parishioners understand German?

A. Yes.

273 Q. You stated I believe it was the policy of your church at some future time to discontinue the use of the German language.

Judge Albert: I object to that because it is something the witness did not say.

274 Q. What is the policy on the part of the church as to discontinuing the use of the German language.

69 A. As I said before, the church has not a commission to teach any language. We do not teach any language as language. We have a commission from the Lord to teach the gospel, and we teach it as we find it among the people. In China, we use the Chinese; in Germany, the German language. Our Synod teaches in seven different languages in this country, and we preach to the people in the language in which we can lead them to the truth and to the Lord.

275 Q. You say the English language will eventually be the language of the church in America.

A. In course of time it undoubtedly will be. It is hard to tell when. You must let that matter have its natural course. The younger generation speak English and prefer English among themselves to any other language in conversation. When they grow up, they will prefer English in the church, too, undoubtedly.

276 Q. In what language do you conduct your songs and prayers in the schools?

A. In late years, the English language.

277 Q. Your testimony as to conditions in Scotts Bluff was derived from your personal knowledge acquired about ten years ago, was it not?

A. No, sir. I think you misunderstood my statement. I have worked among the German-Russians alone. I have not been pastor at Scotts Bluff. It is as a member of the board of missions that I know I have not been up there over the field in seven years and kept in touch with the conditions.

278 Q. You have not been up there since seven years ago.

A. No sir. I have just heard by report.

279 Q. Then your description of the situation at Scotts Bluff at the present time is derived from hearsay.

70 A. No, sir, not hearsay.

280 Q. What is it derived from?

A. Derived from missionaries who have been up there. They have to send in regular reports on the condition of the church and the school and the result of the work.

281 Q. Then it is derived from these reports and not from your knowledge?

A. It is not from I have been there, but from these written reports from out there.

282 Q. The only thing you know about the situations is derived from reports at the present time.

A. From the reports of the men out there only.

283 Q. Now does this floating population apply to the public schools as well as to the parochial schools generally?

A. Out there?

284 Q. Yes.

A. Yes, sir.

Redirect examination.

By Judge Albert:

285 Q. You say this is not so much from personal knowledge or observation of the conditions at Scotts Bluff, the western part of the State, as it is from the common history of the State that you know these conditions exist out there.

A. It certainly is.

286 Q. It is a part of the records of your church?

A. Yes, sir.

## Questions by Mr. Mullen:

287 Q. This is what you have learned in the usual and ordinary course of carrying on the business of the church?

A. Yes. Our missionaries have to report regularly every three months on the condition of the congregations and the schools  
71 and on the difficulties arising. If special difficulties arise they come for advice to the members of the Board of Missions who hear them.

288 Q. Without your request?

A. Yes. They are under obligation to make reports to the church.

289 Q. Is that for the purpose of giving the Synod information regarding the condition?

A. Yes, sir.

Witness excused.

JOHN SIEDLIK, being produced, sworn and examined on the part of the plaintiff, testified as follows, viz:

## Examined by Mr. Mullen:

290 Q. What is your name?

A. John Siedlick.

291 Q. Where do you live, Mr. Seidlik?

A. South Omaha, 29 A Street.

292 Q. Where were you born?

A. In Galicia.

293 Q. In Russian-Poland?

A. Poland, in German Poland.

294 Q. How old are you?

A. Thirty-eight.

295 Q. Are you a naturalized citizen of the United States?

A. Yes.

296 Q. Completed your citizenship?

A. Yes.

297 Q. How long have you lived in Douglas county?

A. Eighteen years.

298 Q. A voter and qualified elector of this State.

A. In this State.

299 Q. You vote at elections?

72 A. Yes.

300 Q. What parish do you belong to down there, what church?

A. Polish Church, St. Francis Parish.

301 Q. What religion is that?

A. Catholic.

302 Q. Roman Catholic, is it?

A. Yes.

303 Q. Are you a married man?

A. Yes.

304 Q. How many children have you?

A. Seven.

305 Q. Was your wife born in Poland?

A. Yes.

306 Q. Does she speak the English language?

A. No, sir.

307 Q. What business are you in at South Omaha?

A. I am at the Union Stock Yards. I take sheep in car, load cars.

308 Q. That is you are a yard man?

A. Yes.

309 Q. You speak some English, do you?

A. Not very much.

310 Q. Does your wife speak any English at all?

A. No, sir.

311 Q. What language do you use in your home?

A. Polish.

312 Q. Do you talk to your children in that language?

A. Yes; talk to them Polish, and they talk some English.

313 Q. Can your wife talk to them in the English language with reference to religion?

73 A. Why just Polish.

314 Q. Can your wife talk any language but Polish?

A. Yes.

315 Q. She uses the Polish language?

A. Yes.

316 Q. Are you able to give any instruction to your children in English language?

A. No, sir.

317 Q. Are you able to tell your children anything about religion and morals in the English language.

A. Not very much.

318 Q. You don't understand that?

A. No.

319 Q. Now as for educating your children, have you contributed to the support of the parochial school in South Omaha?

A. Yes.

320 Q. Where is that?

A. St. Francis School.

321 Q. That is the parochial school in this parish where you live?

A. Yes.

322 Q. What kind of people live there generally who attend that school?

A. Polish people.

323 Q. Came from Poland about the same time you did?

A. Yes.

324 Q. Laboring men, are they?

A. Yes.

325 Q. What do they work at, what do they do down there?

A. They work in the packing house.

326 Q. And on the streets and in different ways?

74 A. Yes.

327 Q. Have you any doctors or lawyers down there?

A. Yes.

328 Q. Lawyers? Have you?

A. No.

329 Q. You are laboring people down there, are you, the people that attend the parish church are laboring people and work in the packing house?

A. Laboring.

330 Q. Have you contributed something to the school, have you given any money to it.

A. Yes.

331 Q. How much money have you given it for the purpose of supporting it?

A. I guess the children pay \$2 every month.

332 Q. Did you build a school?

A. Yes.

333 Q. How much did you pay for that?

A. One hundred dollars for school paid.

334 Q. How much have you contributed to build and maintain the school aotgether?

A. Over \$500.

335 Q. Do some of your children attend this school?

A. Yes.

336 Q. How many?

A. Four children.

337 Q. Do you pay something for each child going to school?

A. Yes; 50 cents each.

338 Q. Who teaches in the school?

75 A. The sisters.

339 Q. Do they speak English?

A. Yes, ma'am.

340 Q. Speak English?

A. Yes, Ma'am.

341 Q. They use both English and Polish?

A. Yes, ma'am.

342 Q. When the children start to go to school, what language do they talk first?

A. They talk only Polish.

343 Q. Nothing else?

A. No.

344 Q. When they get through the 7th or 8th Grade, what do they talk?

A. Polish and English.

345 Q. Both?

A. Yes, ma'am.

346 Q. Do they speak both Polish and English in your school?

A. Yes, ma'am.

347 Q. Do they teach religion in this school?

A. Yes, sir.

348 Q. The Catholic religion?

A. Yes.

349 Q. Reading, writing and arithmetic?

A. Yes.

350 Q. Do they speak Polish?

A. Yes.

351 Q. Do you want your children to study them?

A. Yes, sure.

352 Q. And in English?

A. Yes.

353 Q. Do you want your children to be instructed in religion in your school?

A. Yes, ma'am.

354 Q. Do you want your children instructed in that in whatever language they understand it, whether English or Polish, in the language that they can understand religion?

A. (No answer.)

355 Q. Do you want the children to understand their instruction?

A. I don't understand.

356 Q. I will withdraw the question.

Q. Have they been teaching Polish in your school since this law passed.

A. Yes, Polish.

357 Q. Have they been teaching Polish since last spring? Do you understand my question? Have the sisters been using any Polish in that school since the law was passed?

A. Yes, sir.

358 Q. I don't think you understand me. Have these sisters been using the Polish language, have they talked to the children in Polish since they passed this law.

A. No; they don't talk Polish.

359 Q. What effect has that had on your children in the lower grades?

A. This time in English they couldn't do nothing.

360 Q. Why couldn't they do anything.

A. They understand not the English language.

361 Q. Do you want your children to be instructed in religion in that school?

Court: Possibly he don't understand the word "instructed?"

362 Q. Do you want your children instructed in that school, or told in that school, about religion?

A. Yes.

363 Q. Is that the purpose of it, is that what you want?

A. Yes, ma'am.

364 Q. How much is that school worth there?

A. About \$10,000, the school.

365 Q. Do you know how many children go to school there?

A. I guess 460.

366 Q. Are you acquainted with the other men who live there, whose children go there?

A. Yes. They stop the Polish school and the- stop teaching school. They don't "versteh" nothing.

367 Q. If they stop teaching Polish there, the people will not patronize the school, you will not patronize the school will you?

Defendants object as incompetent and immaterial.

368 Q. Have you a list of some of the men that live there in that school district.

A. Yes. They stop the Polish school, stop the children going to school. (Showing paper.)

369 Q. Are these men Polish who when they stopped the Polish teaching and taught in English who took their children out of that school; say they will do so?

A. Yes.

Defendants object as leading. Sustained. P'ff excepts.

370 Q. Have you a card showing the record of one of your boys in your school?

A. Yes, ma'am.

371 Q. Is this Exhibit "A" one of the records for a year in that school?

A. Yes, for a year.

78 Q. For one of your children?

A. Yes, for one of your children.

Cross-examination.

By Mr. Wheeler:

372 Q. Did I understand you to say your children could not understand the English language?

A. They "versteh" English and for six or seven rooms talking English.

373 Q. How many children do you have?

A. Seven.

374 Q. What is the age of the youngest?

A. About six; two going out of school.

375 Q. How old is the oldest?

A. Sixteen, boy.

376 Q. Does he talk English?

A. Yes ma'am.

377 Q. How many of your children talk English?

A. Five.

378 Q. Can those five read and write English?

A. Yes; five can talk.

379 Q. Can the five oldest ones read and write English?

A. The oldest boys talk good English and the girl English pretty good.

380 Q. Do all your children talk Polish?

A. Yes ma'am all talk Polish.

381 Q. Every one of them?

A. Yes ma'am.

382 Q. Your wife has no trouble in giving religious instruction in Polish in the home, has she?

A. My wife talk Polish in the home.

79 383 Q. She talks Polish to the children?

A. Yes.

384 Q. The children understand her?

A. Yes ma'am.

Witness excused.

Rev. THEOBAED KALAMAJA, being called, sworn and examined testified as follows, viz:

Examined by Mullen:

385 Q. Where do you live, Father?

A. Omaha.

386 Q. How long have you lived in Nebraska?

A. I have lived here nineteen years with interruptions.

387 Q. You are a Catholic priest?

A. Yes.

388 Q. And in charge of a parish in Omaha?

A. Yes: Immaculate Conception Parish.

389 Q. Is that a Polish Parish.

A. Exclusively.

390 Q. That is not the same one John Seidlik lives in?

A. No, sir; different one.

391 Q. How many Polish parishes in Omaha?

A. Three.

392 Q. How long have you been a priest, Father?

A. Twenty-six years.

393 Q. Most of your labors in Omaha?

A. Yes, most of my labors in Omaha.

394 Q. In a general way, about how many Polish schools in this State?

A. There are, as far as I know, eleven schools in the different parts of Nebraska.

80 395 Q. The Catholic Church has parochial schools all over the State?

A. Yes.

396 Q. How many different languages used in the parochial schools in this State?

A. I think four or five.

397 Q. What are the languages?

A. Well, English, German, Polish, Bohemian schools.

398 Q. Some French?

A. I couldn't say whether we have or not. I don't know about that. These languages I have mentioned, I jknow they have schools.

399 Q. What is the policy in the way of conducting the schools, what language do they use?



A. The language of the people that they understand, that the children understand.

400 Q. Whatever language is necessary to reach the people to teach them?

A. Yes; to reach the people.

401 Q. Are you acquainted with the conditions present in this St. Francis Parish where John Seidlick lives?

A. I am a neighbor of St. Francis. I am pretty well acquainted with conditions there.

402 Q. Have you had some knowledge of the Parish schools in the State?

A. Not all of them, no personal knowledge of them; but I have heard about them.

403 Q. You know these Polish schools in Platte county?

A. I know them pretty well.

404 Q. At Columbus and other places?

A. Yes, Omaha.

405 Q. How about Howard county?

81 A. I don't know.

406 Q. Ashland?

A. There are polish schools out there.

407 Q. Now, Father, are you acquainted with the school in St. Francis Parish?

A. Yes.

408 Q. What sisters teach there?

Q. The Franciscan Sisters. They belong to the order.

409 Q. That is an order of teachers in the Catholic Church?

A. One of the orders.

410 Q. They devote their entire life to teaching?

A. Yes. The order of sisters devote their life to hospital work and teaching. These sisters are exclusively engaged in teaching.

411 Q. Do they teach the Polish language?

A. Yes.

412 Q. And the English language.

A. Yes.

413 Q. Are they qualified teachers?

Q. They have a State certificate and——

414 Q. Do you know about the grades of study in the St. Francis School?

A. Substantially the same as mine and the grades of the State. We must cover the established grades of study of the State required by law.

415 Q. Do these graduated go into the high schools without examination?

A. They do.

416 Q. As soon as they have passed through the 8th Grade they are accepted into the high school without examination?

A. Yes.

417 Q. Have they done that in Omaha?

A. Yes.

418 Q. All the graduates of your school can enter the high school.

82 A. The Franciscas schools. That is the way of telling it.  
419 Q. Do they use Polish in that school?

A. Well, we taught the Polish in my school and the St. Francis.  
420 Q. The St. Francis school.

A. They taught Polish there, reading, writing; Polish history, in all the Grades, reading, writing and history; grannar, *thought* all the grades until they graduated, the Polish language gram-atic-ally and fluently.

421 Q. Did they teach religion in Polish?

A. Yes.

422 Q. Also English in your school?

A. Yes.

423 Q. Above the 7th Grade? How is that.

A. They started to use the English language exclusively for instruction from the 6th Grade on.

424 Q. And used it for other purposes, too.

A. Yes.

425 Q. The children that come in the school, in the 2nd, 3rd, and 4th Grade-, what language do those children speak as a rule when they come to school?

A. You can say 90 of those children are not able to use one sentence in English when they start in. I have this on the authority of a teacher who taught there fourteen years in the primary Grade. She declared it would be impossible to do anything at all with the children without using the Polish language as a medium of instruction.

426 Q. What is their condition as to being able to speak English after the 6th year?

A. All learn the language and speak it.

83 427 Q. Is Polish used there for the purpose of teaching English?

A. Certainly.

428 Q. What is the primary purpose of maintaining the parochial schools as far as the church goes.

A. As far as the church goes, our Catholic schools are maintained for the purpose of giving children a christian education—a christian education as we understand it—combined with knowledge of all secular things for every day life, together with a knowledge of christianity. An education with us does not zimplify mean instruction in a language as a language, but the forming of character and the forming of the heart- of these children so that they can live as respectable people and good citizens of the country.

429 Q. With reference to that in addition to the teaching of language, what is the purpose of these parochial schools.

A. The first reason is, in most schools, the small children coming to school are unable to understand English and, therefore, we must use a language they do understand to talk to them and teach them prayers and religion. We must use the language they understand. In the higher grades as we go up we keep up the language as a matter of sentiment.

430 Q. Do you think it is the idea that the Polanders have a right to know something about the history of their ancestors?

A. I think they have a right to it. They have relatives over there and we descend from that race and naturally have a feeling for the languages and customs, and we keep up the language.

431 Q. And you want to know something about the history of the country?

A. Certainly.

432 Q. Is the work of the sisters down there in teaching religion to the children supplemented by the parents at home?

A. That is the purpose of the school, to help the parent keep up religion.

84 433 Q. Is that a canon or principle in force in the Catholic church requiring parents to do that?

A. I think it is the duty of parents to instruct children in the necessary knowledge of religion. That is the natural duty, and besides it is enforced by the church. There is a special provision enjoining that in all elementary schools religious instruction should be given to children according to their capacity.

434 Q. Have you the canon law here, a copy of it, to present?

A. I have.

435 Q. Can you produce it?

A. Here it is. (Producing.)

436 Q. Now what is this book?

A. Text of canon-law, ecclesiastical law.

437 Q. It is a codification of the laws of the Catholic church?

A. Yes.

438 Q. Used by you as priest.

A. Yes. It is the law for me.

439 Q. It is written in Latin?

A. Les; Latin.

440 Q. Can you translate or refer to the particular sections placing the obligation upon parents in the Catholic church to give religious instruction to children? What section is it, referring to parents.

A. The first canon which obliges parents to instruct children in religion is 10372 of Section 2.

441 Q. Can you translate that from Latin to English so the reporter can get it.

A. (Reading:) It is not only the right but the sacred duty of parents and also of those who take their places to care for the christian education of children.

442 Q. Is there another canon law on that subject.

85 A. Here it is about schools (consulting book), 10373, Section 1st.

443 Q. Translate that.

A. "In every elementary school religious instruction must be given to children according to their capacity."

444 Q. Now do you know whether or not the Polish language has been used in your school *school* since the law was passed.

A. In Franciscan they have not used the language.

445 Q. Do you know whether or not the failure to use the Polish language will have any effect on the value of the property.

A. I say it will have an effect.

Mr. Wheeler: Defendant moves to strike that out as not responsive.  
Court: He asks you if you know. Say yes or no.

A. Yes, sir.

446 Q. Do you know what effect the enforcement of the law had with reference to the pupils in this school, stopping teaching Polish, do you know what effect it had.

A. I know, yes.

447 Q. What effect did it have.

A. It had the effect that some people were ready to withdraw their children from that school. Moreover, the child of this man that testified here has lost one year's school, almost has learned nothing; simply lost time because no Polish was taught, and the children could not learn, could not profit from the English instruction given.

448 Q. Is that true in the primary grade.

A. That is true generally.

449 Q. Is there any way to handle your school to advantage without using the Polish language.

86 A. Not in the primary grade I don't see any.

450 Q. Is that true in the school where you are?

A. To a large extent in mine.

451 Q. The people that live in your parish are Polish people?

A. Yes.

452 Q. Immigrants who came 15 or 20 years ago.

A. About that time.

453 Q. Laboring men?

A. Yes.

454 Q. Now how do these Polish schools compare with the public schools in the same vicinity?

A. I did not institute any comparison between them; but I would judge from the results, the children who are admitted to the high school they get along with the others, as well as those finishing in the public schools. From that I would judge the schools must be on a par.

455 Q. On the question of the utility of the schools generally. The children of these men who work in the stock yards and work on the streets on the earth works they would have the same advantages with the children raised in families where the fathers and mothers are educated people in America, wouldn't they.

A. I think so. It is quite a proposition to deal with children, and that is the question of our labors, and to have the difficulty of teaching them a new language is quite a proposition for them I think they would succeed in spite of all that. I think it is one condition of their work.

456 Q. Now if this school was closed up and these children sent to the public school, what would be the situation?

A. I don't know. They would have to employ Polish teachers to teach them anything.

87 457 Q. That is, to get any place to start with.

A. Yes, to start with.

458 Q. I call your attention to Exhibit "A," to a lot of printing on there. What is that you have in your hand in a general way.

A. It is a monthly school report, parochial school report Franciscan for the year 1920-1921.

459 Q. Now on the fact there it says what on the top.

A. Parochial school Franciscan, in South Omaha, Nebraska. Monthly report of Joseph Siedlik. 5th Grade. 1920-1921.

460 A. I notice it starts with "Wrzes." What is that.

A. Names of the school months, September ending with June.

461 Q. What are those marks there.

A. The number of days attendance in school per month. Sixteen in September; 21 in October; 20 in November, etc.

462 Q. First it is attendance. What if next.

A. Days absent. Next column is attendance at Holy Mass.

463 Q. Do you have mass in the school.

A. In the church.

464 Q. That is a duty of the scholar.

A. The children are free on week days to attend services or not, but they get marked for their attendance in order to encourage them to go. The next is conduct; application, religion subject of instruction. Next, arithmetic; next is Polish reading; English reading; spelling; history of the U. S.; grammar; geography; physiology; composition; civil government; penmanship; music. The last is the average.

465 Q. Over here there is a name signed. Whose is that?

A. The signature of the father.

466 Q. After every month?

88 A. Yes, every month. This report is to be presented to the father and he signs it.

467 Q. Down at the bottom, whose is that.

A. That is the father's below is the teacher's.

468 Q. The name of the sister?

A. Yes.

469 Q. What is on the back.

A. That is an account of school dues.

470 Q. Those figures indicate the amount paid?

A. The first indicated the month and the payment of 50 cents a month for that child, and a receipt for receiving the money by the sister who is the teacher.

Mr. Mullen: We offer in evidence Exhibit "A."

Court: Is that signed by one of the teachers.

Mr. Mullen: Yes.

Mr. Mullen: Is this card similar to the cards used in that school.

A. This is one of the cards.

Q. Is that the kind they use generally down there.

A. Yes; it is. They may have different forms, but the substance is more or less the same.

Exhibit "A" not being objected to is here set out as follows.

(Here follows Exhibit "A," School Report Card, marked page 88½.)

87<sup>1/2</sup>

**SZKOŁA PARAFIALNA ŚW. FRANCISZKA**

W SOUTH OMAHA, NEBR.

Ex A.

Klasa 5 Rok 1920-21

Miesięcz. Zaświad. *Josef Siedlik*

	Dni Nauki	Dni Nieobecne	Obec. na Lekcj.	Obyczaje	Pilność	Religia	Rachunki	Czytanie Polskie	Czytanie Angielskie	Sylabizowanie	Historia St. Zjed.	Gramatyka Angielska	Geografia	Fizjologia	Kompozycja	Rząd Czynny	Kalkulacja	Muzyka	Średnia Miara	PODPIS RODZICÓW LUB OPIEKONÓW
Wrześ.	16	0	16	2	1	2	3	2	3	2	—	3	2	—	3	—	3	4	76	<i>Jan Siedlik</i>
Paźd.	21	0	21	1	1	2	2	2	2	1	—	2	2	—	3	—	2	3	87	<i>Jan Siedlik</i>
List.	20	1	19	1	1	2	2	1	2	1	—	2	2	—	3	—	2	3	86	<i>Jan Siedlik</i>
Grud.	12	0	12	1	1	1	2	2	2	2	—	2	1	—	2	—	2	3	91	<i>Jan Siedlik</i>
Stycz.	20	0	19	1	1	1	2	2	2	2	—	2	1	—	2	—	2	3	90	<i>Jan Siedlik</i>
Luty	19	2	17	1	1	1	2	1	2	1	—	2	1	—	2	—	2	2	91	<i>Jan Siedlik</i>
Marzec	16	0	16	1	1	1	2	1	1	1	—	2	1	—	2	—	2	—	93	<i>Jan Siedlik</i>
Kwiec.	20	0	20	1	1	1	2	—	1	2	—	2	1	—	2	—	2	—	93	<i>Jan Siedlik</i>
Maj	19	1	18	1	1	2	1	—	1	2	—	2	1	—	2	—	1	—	94	<i>Jan S.</i>
Czer.	8	0	8	1	1	1	1	—	1	2	—	2	1	—	2	—	1	—	91 1/2	<i>Jan S.</i>

**STOPNIE**

1. Bardzo Dobrze
2. Dobrze
3. Dostatecznie
4. Niedostatecznie
5. Zle.

Ks. Proboszcz *Michał J. Gluba*

Nauczycielka *Sivstra M. Serafia*

Past

**SZKOLNEGO ZALEGA**

Podpis Osoby Odbierającej Pieniądze		
Wrześ.	50	So. M. Serafia
Paździ.	50	So. M. Serafia
List.	50	So. M. Serafia
Grudz.	50	So. M. Serafia
Stycz.	50	So. M. Serafia
Luty	50	So. M. Serafia
Marz.	50	So. M. Serafia
Kwiec.	50	So. M. Serafia
Maj	50	So. M. Serafia
Czerw.	50	So. M. Serafia

Rodzice powinni pilnie przejrzyć świadectwo nim takowe zwracają napowrót do szkoły. Przeto dzieci mogą dopilnować w nauce, uczęszczaniu do szkoły, sprawowaniu i pilności.

## 89 Questions by Judge Albert:

471 Q. That canon law which you quote is real law? based on one of the admonitions of one of the apostles, isn't it?, to parents to "bring up their children in the fear of the Lord."

A. Yes, it is based on our faith in the teachings of the Lord.

472 Q. Was it not one of the early admonitions of the apostles.

A. Indeed it was.

473 Q. For the parent to bring up the child in the fear of the Lord?

A. Yes.

## Cross-examination.

## By Mr. Wheeler:

474 Q. Were the subjects mentioned in Exhibit "A" taught in English or Polish?

A. Taught in English or Polish; all taught in English except Polish reading, etc.

475 Q. Where were you born?

A. I was born in the province of Posen, a part of Poland, under the Russian rule.

476 Q. And you were brought up in the Polish language.

A. Yes, and also German. We are taught in Polish and German in the old country.

477 Q. When did you commence to study English?

A. When I entered college about 16 years old.

478 Q. You had no particular difficulty in mastering English if you did not commence to study it until you were sixteen?

A. I picked up some English in the parochial school where I attended for one year, and on the street, of course.

479 Q. Your experience would lead you to believe that it is possible to learn a foreign language after a child is 16 years old.

90 Mr. Mullen: The court will take judicial knowledge of that. This is nonsense.

Court: You may answer.

Defendants except.

A. Oh, of course it is possible.

480 Q. Did I understand you to say that you consider it necessary to use Polish to teach English to a Polish child?

A. I do, to a Polish child who don't understand any English.

481 Q. Have you had any practical experience in the vocation of a language teacher.

A. I taught latin at college for sometime, if that would be counted as experience.

482 Q. Have you ever heard of the Berlitz System of Teaching a foreign language?

A. No; I have not.



483 Q. Have you ever heard of a system of teaching language by the use of a foreign language alone?

A. Maybe there is such a system; but I think it would be an awful hard thing to do.

484 Q. Do you not know of night schools in New York City where English is taught to foreigners by the use of English alone?

A. It may be.

485 Q. Are the number of pupils in the Franciscan school increasing or decreasing?

A. The last year I could not very well see much difference in it; because it is two years ago that a new parish was formed from this parish, therefore about 200 children were kept from that parish. But last year they had, as it was said here about 400 children, how many they will have this year I don't know. They are just enrolling them now.

91 Redirect examination.

By Mr. Mullen:

486 Q. How many languages do you speak.

A. I speak three pretty well.

487 Q. English, German and Polish.

A. Yes.

488 Q. And you read French?

A. Read French.

489 Q. And Latin?

A. Yes; and a little Greek.

490 Q. How did it come you studied German?

A. I was forced to study German.

491 Q. The Prussians forced the study of German in Poland, did they?

A. Yes.

Witness excused.

Mr. Mullen: That is our case.

Judge Albert: And we rest.

C. A. BECKER, being called on the part of the defendants, sworn and examined, testified as follows:

Examined by Mr. Wheeler:

Judge Albert: The plaintiff now objects to any testimony in support of the allegations contained under the caption "For a separate defense," the first paragraph which is marked 7; for the reason that the court takes judicial notice of the matters set up, and evidence thereon is not admissible.

Court: I don't know that the attorney is offering anything on that.

Judge Albert: Well, we object at this time to any evidence in support of that matter to head it off.

DARIUS M. AMSBERRY  
SECRETARY OF STATE

WILLIAM L. GASTON  
DEPUTY

Seal of the State of Nebraska



## SECRETARY OF STATE

I, DARIUS M. AMSBERRY, SECRETARY OF STATE, OF THE STATE OF NEBRASKA,

DO HEREBY CERTIFY THAT

The "NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO and OTHER STATES" have no articles of incorporation on file in this department and that the

Said "NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO and OTHER STATES" have no articles of incorporation on file in this department and that the



## SECRETARY OF STATE

I, DARIUS M. AMSBERRY, SECRETARY OF STATE, OF THE STATE OF NEBRASKA.

DO HEREBY CERTIFY THAT

The "NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO and OTHER STATES" have no articles of incorporation on file in this department and that the said "NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO and OTHER STATES" is not a corporation of record in this office.

That the "NEBRASKA DISTRICT OF THE GERMAN EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO and OTHER STATES" filed articles of incorporation in this department January 14, 1904, and that the same are recorded in Book "Z" at page 545 Non-Profit Corporations.

That no amended articles of the "NEBRASKA DISTRICT OF THE GERMAN EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO and OTHER STATES" and changing the name of the "NEBRASKA DISTRICT OF THE GERMAN EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO and OTHER STATES" are on file in this office.

In Testimony Whereof, I HAVE HEREUNTO SET MY HAND AND

AFFIXED THE GREAT SEAL OF THE STATE  
OF NEBRASKA. DONE AT LINCOLN, THIS

( SEAL )

9th DAY OF August  
IN THE YEAR OF OUR LORD ONE THOUSAND  
NINE HUNDRED AND twenty-one  
AND OF THE INDEPENDENCE OF THE  
UNITED STATES THE ONE HUNDRED AND  
FORTY-sixth AND OF THIS  
STATE THE FIFTY-fifth

D. M. Ansberry  
SECRETARY OF STATE

W. L. Gaston  
DEPUTY

FEE

93



Mr. Wheeler: That is what the evidence relates to.

92 Court: I want to be fair in this offer. Make your offer.

Mr. Wheeler: I propose to offer through this witness evidence tending to sustain the allegations contained in defendant's Answer under the caption of Separate Defense, consisting of paragraphs 7 to 10 of said Answer, and to show by this witness the situation existing at Emerald, Nebraska, and to show in said community the use of English was prohibited in religious exercises, although many parents desired to participate in said religious exercises, and did not desire to have their children learn German before they learned English, and that in this specific church the church services in English were specifically prohibited.

Judge Albert: What is the ultimate object? Is it to show facts in justification for the litigation.

Mr. Wheeler: Yes, sir.

Judge Albert: We object to it; for the reason that the conditions justifying, or failing to justify, are matters of which the court will take Judicial notice, and evidence thereof is not admissible.

Mr. Mullen: It is incompetent, irrelevant and immaterial.

Judge Albert: And object because the constitutionality of the law is not to be determined upon questions of fact, but is to be determined by the court.

Court: The court sustains the objection, first, because the matters offered are those that the court takes judicial notice of; second, the legislature is presumed to have some reason for passing its legislation; third, the offer is matters pleaded.

(Defendant excepts.)

Mr. Mullen: We object for the same reason on behalf of the intervenor.

(Same ruling. Exception.)

Mr. Wheeler: We offer Exhibit "B," certificate of the secretary of State.

(Here follows Exhibit "B," marked page 93.)

94 Judge Albert: Objected to for the reason that it is incompetent and immaterial and not in issue in this case.

Mr. Wheeler: We have denied in our Answer that there is such a corporation as the Nebraska District of the Evangelical Lutheran Synod, the name being "Nebraska District of the German Evangelical Lutheran Synod, etc."

Court: I will admit the evidence, however that matter may be.

Mr. Reed: We offer these three depositions in evidence (producing same).

Judge Albert: They are offered for the same purpose, I think, that the testimony of the witness was offered for. I have glanced over the depositions and cannot see any other purpose that they serve.

Mr. Reed: They have to do with the method of teaching in parochial schools, and concerning which the plaintiff- *has* introduced the most of their evidence.

Judge Albert: We object because they were not filed one day before the trial.

(Recess at this point.)

Court again in session.

Judge Albert: The objection of the depositions not being filed in time is waived. But we do object to them for the reason that they could only serve one purpose, or two purposes: One is, to show the condition of the schools, the abnormal conditions in certain  
95 localities; and the other is, to attempt to justify the legislation, and they are not admissible for that purpose. Evidence of isolated delinquencies would have no bearing on the case.

Mr. Reed: We think all this evidence you have introduced is immaterial as to the efficiency of the school. I think that kind of evidence is immaterial.

Court: I think a great deal of that evidence is immaterial as to the efficiency of the schools; but I have allowed that kind of evidence on the part of the plaintiff and I will allow this evidence to be introduced on the other side.

Mr. Reed. We offer the deposition of Lillian Baldridge.

(Same read to the court without objection, and is hereto attached.)

Mr. Wray: We move to strike out the testimony of the witness Lillian Baldridge; for the reason that it is incompetent, irrelevant and immaterial, because it relates to only one of the parochial schools of the plaintiff in this State and does not reflect the conditions as to the other schools of the State, and because the matters and conditions presented are presumed to have been existent or to have been before the legislature before the laws were passed; because the matters are matters of which the court will take judicial notice of, and, further, because the constitutionality of the law is not to be determined on a question of fact, but is to be ascertained by the court.

Motion overruled. Plaintiff excepts.

96 Mr. Reed: We offer the deposition of Ada M. Halderman.

Same read to the court and same motion made to strike as made to the deposition of Lillian Baldrige. Motion overruled. Plaintiff excepts.

(This deposition is hereto attached.)

Mr. Reed: We offer the deposition of C. M. Matheney.

Same read to court same objection as above made and same overruled. Plaintiff excepts.

(This deposition is hereto attached.)

State rests.

Rev. C. F. BRUMMER, being recalled on part of plaintiff, testified as follows, viz:

Examined by Mr. Mullen:

492 Q. The name of this ecclesiastical corporation plaintiff was correctly the German Evangelical Luthern Synod, District of Nebraska?

A. Yes.

493 Q. The word "German" was formerly in the title?

A. Yes.

494 Q. In April, 1917, the proposition was put forward to eliminate that word, I believe?

A. The new constitution was submitted to the general synod in June, 1917, at Milwaukee, and it was adopted; but before any change could be made in the constitution the new constitution had to be submitted to each individual congregation belonging to the synod, and the result had to be reported to the next meeting after three years, and they adopted the new constitution in 1920.

495 Q. And since that time you have gone under the name of the Nebraska District of the Evangelical Lutheran Synod?

A. Yes. Here is the official title (showing some paper).

97 Mr. Wheeler: The defendant moves to strike out all the evidence introduced by the plaintiff in this case. I believe all the evidence was directed to the reasonableness or unreasonableness of this law. If our proposed evidence should go out, plaintiff's evidence should also go out.

Court: A great deal of it is subject to that objection; but I don't know how to segregate it. I think the motion will have to be denied at this time.

(Def't excepts.)

Mr. Wheeler: The defendant moves that the petition of the Nebraska District of the Evangelical Lutheran Synod of Missouri, Ohio and other states, plaintiff, be denied as it is not shown to have any capacity to sue as plaintiff.

Court: I think I will overrule that also.

Defendant excepts.

Plaintiff rests.

Defendant rests.

I, Wm. E. Butler, reporter 6th district of Nebraska, hereby certify that I was present and made a full, true and correct report of all the testimony, objection, motions, rulings and exceptions in this case at the time of the trial.

And I further certify that the above and foregoing 69 pages of typewriting comprise a full, true and correct — of my report so made as aforesaid.

Dated Fremont, October 4, 1921.

WM. E. BUTLER,  
*Reporter 6th District, Nebraska.*

98 In the District Court of Platte Count<sup>y</sup>? Nebraska.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO, AND OTHER STATES, DIEDERICK SIEFKEN, Plaintiffs.

VS.

SAMUEL R. MCKELVIE, CLARENCE A. DAVIS, AND OTTO F. WALTER and Their Deputies, Subordinates, and Assistants, Defendant.

*Depositions.*

Depositions of sundry witnesses taken before me, A. R. Honnold, notary public within and for Scotts Bluff County, Nebraska, on the 29th day of August, 1921, between the hours of 9 a. m. and 4 p. m., at the office of A. R. Honnold, First National Bank Building, Scottsbluff, in said county, pursuant to the attached notices, to be read in evidence on behalf of the defendants in the above entitled case.

LILLIAN BALDRIDGE of lawful age, being by me first duly examined cautioned and solemnly sworn as hereinafter certified deposeth and sayeth as follows:

99 Q. State your name?

A. Lillian Baldrige.

Q. What is your occupation?

A. Housekeeper and school teacher.

Q. How long have you taught school.

A. 25 years.

Q. What kind of a certificate do you hold?

A. Life State.

Q. Where are you teaching?

A. Scottsbluff, Nebraska.

Q. How long have you taught here?

A. 5 years.

Q. What work do you teach?

A. Principal of the West Ward.



Q. Have you ever had occasion to observe the parochial schools operated in Scottsbluff by the Evangelical Lutheran Church?

A. I have.

Q. What was the occasion of your observation?

A. I was appointed as a member of the committee by the board of education, to investigate this school.

Q. What did you find there?

A. I found the instruction of a very inferior class, the text books were out of date and not up to the standard of the public schools.

Q. Did you find them teaching or instructing anything in German?

A. The closing exercises were in German. We found a number of German charts in the primary department.

Q. What was their equipment to teach the primary work as compared with the equipment in the public school of Scottsbluff.

A. I would say there was none and no training on the part of the instructors for primary work.

100 Q. Are you acquainted with the equipment and the course of work laid out for primary instruction in the public schools of Nebraska?

A. I am. I have supervision of the primary departments.

Q. Was there any place in the primary work in the parochial school here when you investigated that was up to the standard of our public schools?

A. None whatever.

Q. How many children did they have in the primary department of the parochial school?

A. About 75.

Q. How many teachers did they have for those?

A. One.

Q. Were they all in one room?

A. They were.

Q. Describe the primary work as they were conducting it there.

A. The text books were very much out of date and the methods used were such of those of 50 years ago.

Q. What is the equipment for primary work in the public schools of Scottsbluff?

A. Where they had one textbook for reading the Scottsbluff public schools have at least ten primers and first readers of different authors. The Aldine method of teaching reading is used in the Scottsbluff schools. In the first grade the average number of pupils is about 35 to a teacher. They are in separate rooms. They seemed to be making an effort to teach by the phonetic methods in the Parochial schools and did not seem to know how.

Q. Did you make any investigation as to the amount of civics and history which they taught?

A. I did.

Q. What did you find?

A. I found no history textbooks in any of the grades. No attempt at teaching civics or citizenship.

Q. What is the course of study of history and civics in the schools of Scottsbluff?

101 A. We begin the teaching of history by textbooks in the 4th grade by using the supplementary readers. We have a course in citizenship from the 1st grade up, through all of the grades.

Q. How many grades were they teaching in the parochial school of Scottsbluff?

A. I would say seven grades.

Q. You were able to find no history work of the United States; no civics and no citizenship work being taught in any of those seven grades.

A. I was not.

Q. Were there any pictures of American's prominent men in the schools such as Washington and Lincoln?

A. There were none that I -aw.

Q. Were you in all of the rooms which they had?

A. I was.

Q. Did you see an American flag in any of their school rooms?

A. I did not.

Q. How many rooms did they have there?

A. Three.

Q. And how many teachers?

A. Three.

Q. And how many pupils to the entire seven grades?

A. About 150.

Q. What is the practice in the public schools as to teaching respect for the flag and matters of that kind?

A. There are daily lessons given in citizenship and patriotism, from the primary up.

Q. At the time the parochial school was closed last year were any of their pupils brought to the Wdst Ward School of which you are principal.

A. There were.

Q. Referring to the older ones what was their understanding of the English language, their ability to speak and write it as compared with pupils who had received their instruction in the public schools of Scottsbluff?

102 A. I did not have any.

Q. Did you receive any from the primary grades?

A. About 40.

Q. What was their relative standing and knowledge of the English as compared with pupils of the same age who had been in the American schools?

A. They had to be started from the beginning.

Q. Did those whom you received show any desire to take part in patriotic exercises which you held in your school?

A. They did.

Q. What was their conduct?

A. They were given daily exercises in patriotism such as the saluting of the flag and the singing of patriotic songs and did it in an enthusiastic manner.

Q. How did they enter into the play with the American children?

A. They do not know how to play. The younger pupils were soon trained to take part and enjoyed it. The older children were slow to enter into the games.

Q. Did the older children show any desire to mingle with the American children?

A. Not at first.

### LILLIAN BALDRIDGE.

ADA M. HALDERMAN, being by me first duly sworn examined and cautioned as hereinafter certified deposeth and sayeth as follows:

103 Q. What is your name?

A. Ada M. Halderman.

Q. What is your occupation?

A. County superintendent of schools, of Scotts Bluff County, Nebraska.

Q. How long have you been county superintendent?

A. Nearly seven years.

Q. As county superintendent have you visited and investigated the parochial school maintained by the Evangelical Lutheran Church?

A. I have.

Q. At the beginning of the last school year how many schools were they operating in Scotts Bluff County and where were they located?

A. Three, Scottsbluff, Gering and near Minatare (A. M. H.).

Q. When did you first visit these schools? Last year?

A. In the fall and winter of 1920 (A. M. H.).

Q. Are you acquainted with the course of study prescribed by the state of Nebraska for Public school work?

A. I am.

Q. Were the schools maintained by the Evangelical Lutheran Church identical with and equal to the public schools of this state?

A. They were not.

Q. In what way were they not?

A. Equipment, sanitary measures, texts, library, instruction, standards, number of pupils to a teacher, grading, hours, time spent on regular textbook work, seating, lighting, heating, organization for play, training of teachers, for primary work especially.

Q. In the matters which you have referred to were the parochial schools superior or inferior to the public schools?

104 A. They were inferior.

Q. Explain in detail wherein the parochial school was inferior to the public school in the matters to which you have referred.

A. Scottsbluff school: One room was small, poorly ventilated; text books and library facilities insufficient, instruction in the intermediate rooms was by the temporary minister-teacher brought in from Alliance and apparently little trained for teaching school. In the primary room there were too many pupils to the teacher and the

instruction was entirely inadequate, showing lack of training on the part of the teacher and the lack of a proper understanding of the methods he was to teach. In temperament he was not chosen for his understanding and sympathy for little children. The standards were far below those of the public schools in plan and execution.

Gering: School composed of city and rural pupils, 40 in all under one teacher, including five or six grades. Equipment and texts equal rural

to those found in an average school. Attention to primary work was

[is]\* fairly good; since the Gering schools were badly crowded, no attempt was made to put the Gering children into their own graded schools last year. Results in this school were in general those to be found in a similar rural school.

Minatare: School held in a church. The seats were the church benches with hinged desks. They were all the same size. Many children had their feet several inches clear of the floor all day. They sat five or six in one seat, moving when necessary to let the inside ones out. There were cross lights. The rooms was fairly heated by means of a large stove. Other equipment fair. No playground apparatus and no sanitary water supply. No attention to the physical examination of pupils. Some texts were out of date. Little attention given to primary methods. First 15 minutes of the program given to religious instruction. Confirmation class was held before about

105 the opening of school. All children of all grades came at A rural (A. M. H.) and town

the same time [as]\* rural districts and remained at school from about 8:30 to 4:00 or after. Children when not reciting sat in poorly fitted seats. They wore their wraps, coats and overshoes and whenever they wished. No attempt was made to let these children have exercise except at regular intermission. The[y]\* teacher who was also the minister was absolutely untrained in primary methods; although

— apparently possessing a native sympathy for children. He did not know that his pupils were far below standard and would not have known how to remedy the condition if he knew their deficiencies. Bright class of primary pupils were simply marking time and learning that was (A. M. H.)

ing how to be lazy. One set of readers for a grade was all A provided. Some of these were printed many years ago, especially for parochial schools, and showed no development of primary reading principles. The only busy work provided for primary pupils was copying which was skillfully done and the meaning of the words little understood. 48 pupils in six grades including about one half Minatare pupils and one half pupils from rural districts were gathered in this school.

In order to bring the school up to standard, additional equip-

[\*Words in brackets erased in copy.]

ment and an extra teacher were provided during the holidays, all classes being held in the same room as before. The second teacher given in charge of the primary pupils was the same one who was below standard in Scottsbluff. While the school showed improvement the unanimous opinion of a committee composed of two city superintendents, an ex-city superintendent, grade principal, county superintendent, and a school-board member who had taught for several years was that the school was still far below the standard of the Minatare school in equipment, teacher-training, division of classes, organization, sanitary devices, sympathy with child life, the standard toward play, time for individual classes, and general results.

06 The Gering school was permitted to retain the same pupils last year because of the over-crowded condition of the Gering schools during the construction of new buildings. The Scottsbluff school could not come up to standard of the graded schools and closed their doors for the holidays. The Minatare school was so much superior to the parochial school nearby that the town (A. H.) pupils were required to leave the parochial school and enter the town school and giving them four months to bring up the parochial school to the standards required by the state superintendent for public schools. Owing to the over-crowded conditions in two or three rural schools from which the remaining pupils of the parochial school had come the rural pupils were permitted to remain for the rest of the year in the parochial school.

Q. In those districts where the children of the Russian and German parentage attend the public schools what is the number of Russian and German children compared with the American parentage children?

A. In nine of the beet-growing districts I find 303 out of 423 enrolled in December were Russians and Germans.

Q. That is, you mean they were of Russian or German parentage?

A. Yes.

Q. What schools do these figures cover?

A. District 5, 8, 17, 20, 24 North, 24 South, 29, 39, 50.

Q. Are any city schools included?

A. No.

Q. Are there any parochial schools included?

A. No, although many pupils from these districts have <sup>previously in the year (A. H.)</sup> gone into the parochial schools.

ADA M. HALDERMAN.

C. M. MATHENY, being by me first duly cautioned, examined and solemnly sworn as hereinafter certified, deposeth and sayeth as follows:

107 Q. What is your name?

A. C. M. Matheny.

Q. What is your occupation?

A. I have been superintendent of the public schools of the city of Scottsbluff for the past eight years.

Q. During that time have you had occasion to observe the parochial school operated in Scottsbluff by the Evangelical Lutheran church.

A. Yes, I have.

\* \* \* \* \*

Q. How often have you investigated that school and visited it?

A. Several times each year, during my superintendency in the city.

Q. How long was this school in operation in Scottsbluff?

A. I found it operating when I came here eight years ago and it so continued till the year before last and was again re-opened last fall.

Q. What equipment did they have for teaching the common branches?

A. Their equipment was furnished by the Concordia Publishing Company of St. Louis, their church publishing firm, for this synod. This equipment is antiquated and has in no sense been kept up to (of the public schools, Generally one reader only is furnished) the standards and principles and methods <sup>^</sup> for a grade, carrying the publishing date of 1884. There were charts or combination of English and German and date back over a period of 25 years. In no sense are the material and method of these texts modern and up to the standard of those furnished in the public schools.

Q. What are their facilities for operating a school during the time that you were superintendent in Scottsbluff? And compare them with the facilities of the public schools of Scottsbluff?

A. Their rooms are poorly heated and badly ventilated, in fact they have no modern method of ventilation installed. The  
108 seats were hand-made and not of size fitted to the children of different ages. Books and other teaching equipment were entirely inadequate. Playground and toilet facilities would not meet the standard set by the state department. Teachers were not trained for grade work. They send out their young ministers in training to the schools of this church. These men have had no preparation in the teaching of primary children and fail utterly from the standpoint of instruction and sympathy with young childhood. Their rooms have been overcrowded, composed of two to three grades and enrolling 50 to 75 children.

Q. During the time that you were superintendent of Scottsbluff was this parochial school ever operated up to the standard of the city schools and was the course of study equivalent to that of the city of Scottsbluff?

A. It was not.

Q. What was finally done with this school?

A. It was closed voluntarily last December.

Q. And why?

A. This school failed to meet the standard as laid down by the law of the state.

Q. Did the pupils from the parochial school then come into the schools of Scottsbluff?

A. They did.

Q. Were they able to go ahead with the work in the public schools with children of their own age and grade?

A. They were not.

Q. Why?

A. Their previous method of instruction, knowledge of English, and adaptability made it impossible for them to be classified in the same grades as in their own school.

Q. How far were they demoted below their grades in order to start them into the public schools?

A. It was necessary in nearly all cases to put them back one grade and in the first grade start them at the beginning.

Q. Of the German-Russian children who came into the public schools without a period of training in the parochial school, what was their average ability to grasp the work as compared with the American children?

A. It was on a par with that of the American child.

Q. Was that true of the children who had first been trained in the parochial school and if not in what way did they differ?

A. It was not. Evidently the method and instruction given these children in the parochial school had been such as to make it impossible for them to adapt themselves to the classroom work of the public school.

Q. Have you observed the children of Russian and German parentage who have been trained in the public schools as to their willingness to mingle with the American children?

A. I have.

Q. Did they differ in any way from the American children in their willingness to associate and play with American children?

A. I find no difference.

Q. What was true as to the children who had been trained in the parochial school and who later came to the public school?

A. It was largely a matter of inability to mingle with American children, their teaching and training having been such as to make them unwilling to associate with American children.

Q. Did they teach anything of American history and civics in the parochial school in Scottsbluff?

A. I made several inquiries of their head teacher as to this and he was planning at the time the school was closed last December to secure text books for this purpose, but at that time such had not been secured.

Q. Was there any training or teaching given in American citizenship?

A. None that I know of.

Q. What was the attitude of the parents of these children toward sending them to the public schools?

A. Large numbers of them told me personally that they would much prefer to have their children in the public school but that the church officials required them to attend this school in order to be confirmed.

Q. Are you a graduate of any college or university?



A. I hold my B. Ped. from the Ohio University, and My M. A. from the Ohio State University.

Q. How long have you been in the profession of school teaching and school work?

A. About 25 years.

C. M. MATHENY.

111 STATE OF NEBRASKA,  
*County of Scotts Bluff, ss:*

I, A. R. Honnold of the County of Scotts Bluff and State of Nebraska, a Notary Public, duly commissioned and qualified for and residing in said county, do hereby certify that Lillian Baldrige, Ada M. Halderman and C. M. Matheny were by me severally sworn, to testify to the truth, the whole truth and nothing but the truth, and that the depositions by them respectively subscribed as above set forth were reduced to writing by B. G. Johnson who is not interested in the suit in my presence and in the presence of the witnesses respectively, and were respectively subscribed by said witnesses in my presence and were taken at the time and place in the annexed notice; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my hand and affixed my Notarial Seal this 29th day of August, 1921.

[SEAL.]

A. R. HONNOLD,  
*Notary Public.*

My commission expires May 6, 1922.

112 In the District Court of Platte County, Nebraska.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF Missouri, Ohio, and Other States and Diederick Siefken, Plaintiffs,

vs.

SAMUEL R. MCKELVIE, CLARENCE A. DAVIS and OTTO F. WALTER, and Their Deputies, Subordinates, and Assistants, Defendants.

*Notice to Take Depositions.*

You will please take notice that the undersigned will, on behalf of the defendants in the above entitled action, take the depositions of C. M. Matheny, Lillian Baldrige, and Ada M. Haldeman, residents of Scotts Bluff County, Nebraska, at nine A. M. on the twenty-ninth day of August, 1921, at the office of and before A. R. Honnold, Notary Public, First National Bank Building, Scottsbluff, Nebraska, for use in the trial of the above entitled action.

CLARENCE A. DAVIS,  
*Attorney General,*  
*Attorney for Defendants.*

To

Albert & Wagner,  
Sandall and Wray,  
A. F. Mullen,  
Attorneys for Plaintiffs.



Service of copy of within notice is hereby acknowledged this 23rd day of August, 1921.

SANDALL & WRAY,  
*Attorney for Plaintiffs.*

113 Endorsed: In the District Court of Platte County, Nebraska. Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other States, and Diederick Siefken, Plaintiffs, vs. Samuel R. McKelvie, Clarence A. Davis, and Otto F. Walter, and their deputies, subordinates and assistants, Defendants. Notice to take depositions.

In the District Court of Platte County, Nebraska.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, Ohio, and Other States and Diederick Siefken, Plaintiffs,

vs.

SAMUEL R. MCKELVIE, CLARENCE A. DAVIS and OTTO F. WALTER, and Their Deputies, Subordinates, and Assistants, Defendants.

*Notice to Take Depositions.*

You will please take notice that the undersigned will, on behalf of the defendants in the above entitled action, take the depositions of C. M. Matheny, Lillian Baldrige, and Ada M. Haldeman, residents of Scotts Bluff County, Nebraska, at nine A. M. on the twenty-ninth day of August, 1921, at the office of and before A. R. Honnold, Notary Public, First National Bank Building, Scottsbluff, Nebraska, for use in the trial of the above entitled action.

CLARENCE A. DAVIS,  
*Attorney General,*  
*Attorney for Defendants.*

To  
Albert & Wagner,  
Sandall & Wray,  
A. F. Mullen,  
*Attorneys for Plaintiffs.*

114 Service of copy of within notice is hereby acknowledged this 23rd day of August, 1921.

SANDALL & WRAY,  
A. F. MULLEN, AND  
ALBERT & WAGNER,  
*Attorneys for Plaintiffs.*

Endorsed: In the District Court of Platte County, Nebraska. Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other states, and Diederick Siefken, Plaintiffs, vs. Samuel R. McKelvie Clarence A. Davis and Otto F. Walker, and their deputies, subordinates and assistants, Defendants. Notice to take Depositions. Filed Oct. 18, 1921. Ethel Gossard, Clerk, by Edward F. Graf, Dp.

Endorsed: 22424. Nebraska District of Evangelical Lutheran Synod vs. McKelvie. Bill of Exceptions. Supreme Court of Nebraska. Filed Oct. 22, 1921. H. C. Lindsay, Clerk.

115 And afterwards, to wit, on the 28th day of November, 1921, there was filed in the office of the Clerk of said Supreme Court a certain Application, in the words and figures following, to wit:

In the Supreme Court of Nebraska.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF Missouri, Ohio, and Other States and Diederick Siefken, Plaintiffs, Appellees,

VS.

SAMUEL R. MCKELVIE, CLARENCE R. DAVIS and OTTO F. WALTER, and Their Deputies, Subordinates, and Assistants, Defendants, Appellants.

*Application of the American Legion, Department of Nebraska, for Leave to Appear as Amicus Curie.*

Comes now The American Legion, Department of Nebraska, a corporation, and respectfully moves the Court, that leave be granted said American Legion, Department of Nebraska, to appear as amicus curie in the above entitled cause for the purpose of filing briefs, submitting argument and making such suggestions as may from time to time appear to be proper as to the issues of law raised and involved, and as to the application of sound legal principles to the facts and issues in said cause, basing its request upon the following reasons:

1. That The American Legion, Department of Nebraska, is a corporation, duly organized and existing under and by virtue of the laws of the State of Nebraska, the members of said American Legion, Department of Nebraska, numbering approximately 20,000, being composed of honorably discharged soldiers, sailors and marines of the United States Army or the United States Navy in Nebraska, who were in the military or naval service of the United States during the so-called World War, between the dates April 6, 1917 and November 11, 1918, and the organization of said American Legion, Department of Nebraska, by said honorably discharged soldiers, sailors and marines of the United States Army or the United States Navy, was effected and now exists, as expressed in the preamble of

116 the constitution of said American Legion, Department of Nebraska, with principles, aims and purposes as follows:

"For God and Country, we associate ourselves together for the following purposes:

"To uphold and defend the Constitution of the United States of America; to maintain law and order; to foster and perpetuate a one

hundred per cent Americanism; to preserve the memories and incidents of our association in the Great War; to inculcate a sense of individual obligation to the community, state and nation; to combat the autocracy of both the classes and the masses; to make right the master of might; to promote peace and good will on earth; to safeguard and transmit to posterity the principles of justice, freedom and democracy; to consecrate and sanctify our comradeship by our devotion to mutual helpfulness."

2. That pursuant to said principles, aims and purposes, The American Legion, Department of Nebraska, became interested in the passage by the Legislature of the State of Nebraska, at its regular session in the year 1921, of the act so passed by said Legislature, and subsequently approved by the Governor of said state, "to declare the English language the official language of this state, and to require all official proceedings, records and publications to be in such language and all school branches to be taught in said language in public, private, denominational and parochial schools; to prohibit discrimination against the use of the English language by social, religious or commercial organizations; to provide a penalty for the violation thereof; to repeal Chapter 249 of the Session Laws of Nebraska for 1919, entitled: 'An Act relating to the teaching of foreign languages in the state of Nebraska' and to declare an emergency"; the text of said act being fully set out in paragraph VII of the petition of plaintiffs herein; and during said regular session of said Legislature pursuant to said interest in the said passage of said act, The American Legion, Department of Nebraska, by its duly elected and qualified officers and regularly appointed committees,  
117 peared, in manner and form according to law, before the various committees of said Legislature of the state of Nebraska, having said act then under consideration, and represented to said committees of said Legislature, the advantages and benefits to be derived from and by the passage of said act.

3. That The American Legion, Department of Nebraska, made application in the District Court of Platte County, Nebraska, for leave to appear in said Court in the above entitled action, as a friend of said Court for the purpose of filing briefs and submitting arguments in support of said act, and that such leave was granted The American Legion, Department of Nebraska, and such appearance was made by it in said Court.

4. That The American Legion, Department of Nebraska, now actuated solely by the aforesaid principles, aims and purposes, and with the same interest in said act as heretofore, believing that said act is in harmony with the adopted and announced principles, aims and purposes of said American Legion, Department of Nebraska, all as aforesaid, and that the enforcement of said act will be most advantageous to the State of Nebraska, and the citizens thereof, and most conducive to the promulgation of and training in the principles of good citizenship and that it is calculated to promote loyalty to the traditions, ideals and institutions of the American Republic,

and to insure the safety of the government of the United States, desires as a friend of this Court, if leave be granted it, to present to this Court briefs and argument, together with such suggestions as may from time to time appear to be proper, in support of the validity and legality of said act.

Respectfully submitted,

THE AMERICAN LEGION, DEPARTMENT  
OF NEBRASKA,

By PITZER, CLINE & TYLER,  
PITZER, CLINE & TYLER,  
ROBERT G. SIMMONS,  
ROBERT G. SIMMONS,  
118 BROGAN, ELLICK & RAYMOND,  
BROGAN, ELLICK & RAYMOND,  
FRED W. ASHTON,  
FRED W. ASHTON,  
SACKETT & BREWSTER,  
SACKETT & BREWSTER,  
EDWARD P. McDERMOTT,  
EDWARD P. McDERMOTT,  
HOLMES, CHAMBERS & MANN,  
HOLMES, CHAMBERS & MANN,  
T. J. McGUIRE,  
T. J. McGUIRE,  
HASTINGS, RITCHIE, MANTZ & CANADAY,  
HASTINGS, RITCHIE, MANTZ & CANADAY,  
SPILLMAN & MUFFLY,  
SPILLMAN & MUFFLY,  
MOTHERSEAD & YORK,  
MOTHERSEAD & YORK,

*Its Attorneys.*

Endorsed: In the Supreme Court of Nebraska. Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other States, and Diederick Siefken, Plaintiffs, Appellees, vs. Samuel R. McKelvie et al., Defendants, Appellants. 22424. Application of The American Legion, Department of Nebraska, for leave to appear as amicus curiae. Supreme Court of Nebraska. Filed Nov. 28, 1921. H. C. Lindsay, Clerk.

And afterwards, to wit, on the 1st day of December, 1921, there was rendered by said Supreme Court and entered of record upon the journal thereof, a certain order in the words and figures following, to wit:

119 Supreme Court of Nebraska, September Term, A. D. 1921,  
Dec. 1.

No. 22424.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, Ohio, and Other States and Diederick Siefken et al., Interveners, Appellees & Cross-Appellants.

v.

SAMUEL R. MCKELVIE et al., Appellants & Cross-Appellees.

Appeal from the District Court of Platte County.

This cause coming on to be heard upon motion of American Legion, Department of Nebraska, for leave to appear as amicus curiæ herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and same hereby is, sustained and leave given said American Legion, Department of Nebraska, to appear as amicus curiæ.

A. M. MORRISSEY,  
*Chief Justice.*

120 And afterwards, to wit, on December 20, 1921, appellants Samuel R. McKelvie et al., as provided by the rules of the Supreme Court of Nebraska, filed in the office of the Clerk of said Supreme Court their printed brief containing their assignments of error; and, afterwards, to wit, on January 17, 1922, the appellees Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other states et al. filed their printed brief of assignments of error in the office of the Clerk of said Supreme Court of Nebraska; and, afterwards, to wit, on February 6, 1922, the appellee John Siedlik filed his brief in the office of the Clerk of said Court containing his assignment of error; and, afterwards, to wit, on March 8, 1922, the said appellees filed their printed amended assignment of errors in the office of the Clerk of said Supreme Court and the following are true and correct copies of such portions of said briefs as are requested in the original præcipes to be made a part of the return to the writ of error herein, to wit:

121 *Appellants' Assignment of Errors in Supreme Court (pp. 11-12 of Appellants' Brief).**Errors Relied on for Reversal.*

Appellants predicate error upon:

## I.

The assumption by the District Court of jurisdiction over constitutional questions contrary to Section 2, Article 5, Constitution of Nebraska.

## II.

The assumption of jurisdiction over the Governor and Attorney General by the District Court of Platte County, when said defendants were not served within the county and when the action was not brought where the cause of action arose.

## III.

The use by the court of equity of its power to enjoin the enforcement of criminal statutes where property rights are not substantially involved.

## IV.

The determination that the foreign language statute interferes with religious worship.

## V.

The determination by the trial court that the foreign language statute in its real meaning is unconstitutional as interfering with religious liberty.

*Appellees' Assignment of Errors in Supreme Court on Cross-Appeal (p. 18, Appellees' Brief).**Errors Relied Upon by Cross-appellants.*

## I.

122 The court erred in deciding and holding that sections 2 and 3 of chapter 61 of the Laws of 1921, and each of them, are embraced within the title of said act.

## II.

The court erred in deciding and holding that sections 2, 3, 4 and 5 of said chapter, and each of them, are constitutional.

## III.

The court erred in limiting the injunction to interference with the plaintiff in giving religious instruction in a foreign language, and sufficient instruction in such language, as to enable it to impart religious instruction therein, and in not extending it to include all subjects of instruction outside school branches.

*Appellees' Amended Assignment of Errors in Supreme Court (pp. 1-4, Separate Brief of Appellees' Amended Assignment).*

Come now the appellees and cross-appellants, The Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other states and Diederick Siefken and for an amended assignment of errors on their cross-appeal, assign jointly and severally the following:

## I.

The District Court erred in deciding and holding that Sections 2 and 3 of Chapter 61 of the Laws of 1921 of Nebraska, and each of said sections, are embraced within the title to said act.

## II.

The District Court erred in deciding and holding that Sections 2, 3, 4 and 5 of Chapter 61 of the Laws of 1921 of Nebraska, and each of said sections are constitutional and not in contravention of Sections 3 and 5 of Article I of the Constitution of Nebraska, or of either of said sections of the Constitution.

## III.

The District Court erred in deciding and holding that Sections 2, 3, 4 and 5 of Chapter 61 of the Laws of 1921 of Nebraska  
123 and each of them are constitutional and not contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, not operating nor calculated to operate to deprive these cross-appellants or either of them of their liberty or property without due process of law, as an unreasonable restraint upon their liberty, or the liberty of either of them, nor as unjustly discriminating.

## IV.

The court erred in limiting the injunction to interference with the plaintiff in giving religious instruction in a foreign language, and sufficient instruction in such language, as to enable it to impart religious instruction therein, and in not extending it to include all subjects of instruction outside school branches.

## V.

Sections 2, 3, 4 and 5 and each of them of Chapter 61, Laws 1921, commonly called the Reed-Norval Act, violate Section 1, Article 1 of the State Constitution.

## VI.

Said sections, and each of them, violate Section 3, Article 1 of the State Constitution.

## VII.

Said sections, and each of them, violate Section 4, Article 1 of the State Constitution.

## VIII.

Said sections, and each of them, violate Section 5 of Article 1 of the State Constitution.

## IX.

Said sections, and each of them, violate section 19, Article 1 of the State Constitution.

## X.

Said sections, and each of them, violate Section 21, Article I of the State Constitution.

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## XI.

Said sections, and each of them, violate Section 15, Article III of the State Constitution.

## XII.

Said sections, and each of them, violate Section 4 of the Enabling Act, passed by Congress April 19, 1864.

## XIII.

Said sections and each of them violate the Fourteenth Amendment to the Constitution of the United States.

## XIV.

Said sections and each of them violate that part of the Fourteenth Amendment to the Constitution of the United States that reads as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor



shall any state deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law."

SANDALL & WRAY,  
ARTHUR F. MULLEN,  
ALBERT & WAGNER,

*Attorneys for Appellees and Cross-Appellants*

*Intervenor Siedlik's Assignment of Errors (pp. 2-5 of Seidlik Intervenor's Brief.)*

### Assignment of Errors.

1. The trial court erred in holding that sections 2, 3, 4 and 5 of the act were valid and constitutional.

2. The trial court erred in holding that the provisions of the act in question did not interfere with freedom of religion.

3. The trial court erred in holding that the Attorney General did not properly construe the provisions of the act in question.

4. The trial court erred in refusing to enjoin the appellants from proceeding under the provisions of sections 2, 3, 4, and 5 of the act in question.

5. The trial court erred in holding that the provisions of sections 2, 3, 4 and 5 of the act in question did not violate the provisions of the 14th Amendment to the Constitution of the United States.

### *Reason for Error.*

The foregoing assignment of errors is based on the proposition that Chapter 61 of the laws of 1921 is unconstitutional and void. The foregoing law is unconstitutional and void and for the following reasons, to-wit:

1. It violates the following provisions of Sec. 1, Art. 1 of the Constitution:

"All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness."

2. It violates the following provisions of Sec. 3, Art. 1 of the Constitution:

"No person shall be deprived of life, liberty, or property, without due process of law."

3. It violates the provisions of Sec. 4, Art. 1 of the Constitution:

"All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences.

No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the right of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing  
 126 herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."

4. It violates the following provisions of Sec. 5 of Art. 1 of the Constitution:

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

5. It violates the provisions of Sec. 19, Art 1 of the Constitution:

"The right of the people peaceably to assemble to consult for the common good, and to petition the government, or any department thereof, shall never be abridged."

6. It violates the following provisions of Sec. 21, Art. 1 of the Constitution:

"The property of no person shall be taken or damaged for public use without just compensation therefor."

7. It violates the following provisions of Sec. 15 of Article III of the Constitution:

"The legislature shall not pass local or special laws in any of the following cases; that is to say, \* \* \* granting to any corporation, association or individual any special or exclusive privileges, immunities or franchises whatever. In all other cases where a general law can be made applicable, no special law shall be enacted."

8. It violates the following provisions of Sec. 4 of the Enabling Act, passed by Congress on April 19, 1864:

"And provided further, that said constitution shall provide, by an article forever irrevocable, without the consent of the Congress of the United States \* \* \* Second. That perfect toleration  
 127 of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship."

9. It violates the following provisions of the Fourteenth Amendment to the Constitution of the United States:

"No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due

process of law, nor deny to any person within its jurisdiction the equal protection of the law."

In addition to the foregoing it is suggested that the act is unconstitutional for the reason that the body of the act is wider than its title. While there is merit in this contention our view is that the subject matter of sections 2, 3, 4, and 5 cannot be made valid or constitutional under any title. The subject matter of these sections violates and contravenes the provisions of the Constitution of the State, the provisions of the Enabling Act, and the provisions of the Constitution of the United States.

And afterwards, to wit, on the 19th day of April, 1922, there was rendered by said Court and entered of record upon the journal thereof a certain Judgment, in the words and figures following, to wit:

128 Supreme Court of Nebraska, January Term, A. D. 1922,  
April 19.

No. 22424.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, Appellees & Cross-Appellants,

v.

SAMUEL R. MCKELVIE et al., Appellants & Cross-Appellees.

Appeal from the District Court of Platte County.

This cause coming on to be heard upon appeal from the district court of Platte county, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said district court. It is, therefore, ordered and adjudged that said judgment of the district court be, and same hereby is, reversed and the action dismissed; that appellants pay all costs incurred herein, taxed at \$—, and have and recover of and from appellees the costs so expended; for all of which execution is hereby awarded, and that mandate issue accordingly.

Opinion by Flansburg, J.

Morrissey, C. J., dissenting separately.

A. M. MORRISSEY,

*Chief Justice.*

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Opinion by said Court, pursuant to which the preceding judgment was entered, which opinion is in the words and figures following, to wit:

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No. 22424.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, etc.,

v.

McKELVIE.

*Opinion.*

Filed April 19, 1922.

1. The statute (Laws 1921, ch. 61), relating to the teaching of foreign languages, is a reasonable exercise of the police power and is not unconstitutional, as being in violation of either the state or federal constitutions.
2. In its operation it does not deprive any person of life, liberty or property without due process of law, nor does it deny the equal protection of the law; nor is it invalid, as a restriction upon the freedom of religious worship, nor as an unwarranted interference with the giving of religious instruction.
3. The title of the act, declaring that all school branches are to be taught in the English language, is sufficiently broad to cover provisions regulating and prohibiting the teaching of foreign languages. Such provisions are germane to the subject-matter expressed in the title and are reasonably calculated to aid in carrying out the expressed object.

130 Heard Before Morrissey, C. J., Rose, Dean, Aldrich, Day, and Flansburg, JJ.

FLANSBURG, J.:

This is an injunction proceeding brought to test the constitutionality of the statute (Laws 1921, ch. 61), relating to the teaching of foreign languages, without passing upon the propriety of the form of action pursued, we find that the questions presented are largely controlled by the decision in *Meyer v. State*, 107 Neb., —, upholding a similar statute enacted in 1919.

The 1921 statute, after declaring that the English language shall be the official language of the state and that the common school branches shall be taught in that language, provides:

"Section 2. No person, individually or as a teacher, shall, in any private, denominational, or parochial or public school, teach any subject to any person in any language other than the English language.

"Section 3. Languages other than the English language may be taught as languages only, after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate

of graduation issued by the county superintendent of the county or the city superintendent of the city in which the child resides. Provided, that the provisions of this act shall not apply to schools held on Sunday or on some other day of the week, which those having the care and custody of the pupils attending same conscientiously observe as the Sabbath, where the object and purpose of such schools is the giving of religious instruction, but shall apply to all  
 131 other schools and to schools held at all other times. Provided, that nothing in this act shall prohibit any person from teaching his own children in his own home any foreign language."

The law is not directed at the teaching of the German language only, but applies to all foreign languages, the so-called ancient or dead languages, not being, strictly speaking, foreign languages, obviously do not come within the spirit or the purpose of the act.

The objections raised resolve themselves into one question: Is the enactment a proper police regulation, reasonably calculated "to promote the health, peace, morals, education or good order of the people," and therefore a regulation excepted from the scope of the constitutional provisions, both state and federal, which prohibit the taking of life, liberty or property without due process of law, and which guarantee the equal protection of the law, and preserve the right of freedom in religious worship?

The reasons found by the legislature for this enactment, we believe, are set out in our opinions in *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 104 Neb. 93, and *Meyer v. State*, supra. The legislature intended that the English language should become the universal language of the state; that children of foreign parentage should be so reared and educated that English would come to be their natural language and the language which they would continue to use. Children of foreign parentage, first starting to school, are able to talk the language of their parents. That language is at that time the one naturally favored by them. The requirement, that children who have not passed the eighth grade shall in language study apply themselves exclusively to the English language, so that English shall be mastered and become the more favored one, we are not ready to say is a measure more stringent than is warranted, nor that the legislature has acted without reason and in a purely arbitrary manner. The law does not create an absolute prohibition  
 132 tion against the learning of a foreign language. It only postpones and regulates that teaching. There is no curb on knowledge. Such children have a sufficient task to master English in what time and opportunity is available to them for language study. When the child becomes sufficiently versed in English, which, in the eyes of the law, is when he has passed the eighth grade, and has received the instruction in English which necessarily goes with that extent of education, when that language has become his language, then he is free to study whatsoever language he pleases. The statute was enacted in a jealous regard to further and assure the universal use of English, and, as a means to that end, to curtail, so far as could reasonably be done, the rearing of children of foreign

parentage in the language of their parents. As pointed out in the Meyer case, in operation the law will be recognized as a restraint almost entirely and alone by the foreign element of our population. It is true, in some instances, that there may be other persons who will desire to have their children instructed in a foreign language before the children have passed the eighth grade, but the reasonableness of the law is to be determined by the general class upon which it operates, and the general object and remedy sought to be attained, and individual rights must yield to the general public benefit.

The pleadings on this case show that both the intervener, as well as other parents of children of the schools, affected by this act, have a knowledge of the English language, as well as a knowledge of the language of their own country; that their knowledge of English, though sufficient for business transactions, is so limited that they are unable to impart religious instruction to their children, and are unable to conduct religious worship in English. This is the very condition the legislature seeks to change. The whole object and purport of the law is to the end that it will bring about a condition where the English language will be the favored one.

It is claimed that the law is discriminative. It applies, however, to all schools generally. It covers all of the schools where  
 133 it is well known, children now receive their education. It operates equally upon all children who have not had an eighth grade education and a knowledge of English which will be consequent therefrom. Private instruction by a hired tutor, whether within or without the scope of the law, is instruction which is negligible in its extent. In either event, the law operates in this matter without discrimination. The use and resulting knowledge of a foreign language in the home is not restricted, nor is instruction there prohibited. The exception of Sabbath schools from the law has been placed there with the evident purpose of preventing interference with religious exercises. It is not essential to the validity of the law that it should be a complete and absolute prohibition against the teaching of foreign languages. It was not intended to be such. The law is a regulation of such teaching, and not a prohibition. The qualifications made are not without reasonable basis, and cannot be said to be purely arbitrary.

As was said in the case of *Wenham v. State*, 65 Neb. 394, 404: "The members of the legislature come from no particular class. They are elected from every portion of the state, and come from every avocation and from all the walks of life. They have observed the conditions with which they are surrounded, and know from experience what laws are necessary to be enacted for the welfare of the communities in which they reside. They determined that the law in question was necessary for the public good. \* \* \* That question was one exclusively within their power and jurisdiction and their action should not be interfered with by the courts, unless their power has been improperly or oppressively exercised."

In the case of *Barbier v. Connolly*, 113 U. S. 27, in speaking with regard to the exercise of police power, the court, referring to the Fourteenth Amendment of the Constitution of the United States:

said (p. 31): "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police  
134 power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, \* \* \*

Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

It appears to us that the law is a reasonable exercise of the police power and is not unconstitutional, as in violation either of the state or of the federal Constitution. In its operation it does not deprive any person of life, liberty or property without due process of law, nor does it deny the equal protection of the law. It does not interfere with religious liberty nor with the giving of religious instruction.

It is claimed that the portion of the act which is quoted in this opinion is not embraced in the title. The title of the act reads as follows: "An act to declare the English language the official language of this state, and to require all official proceedings, records and publications to be in such language and all school branches to be taught in said language in public, private, denominational and parochial schools; and to prohibit discrimination against the use of the English language by social, religious or commercial organizations; to provide a penalty for a violation thereof; to repeal chapter 249 of the Session Laws of Nebraska for 1919, entitled 'An act relating to the teaching of foreign languages in the State of Nebraska' and to declare an emergency."

The title of the act is admittedly broad enough to cover a  
135 provision declaring that the English language cannot be taught by means of a foreign language, but plaintiffs contend that the title is not broad enough to cover a provision preventing the teaching of a foreign language in English. When we consider the object of the statute, the distinction is somewhat refined. It is the employment of a foreign language in school which is manifestly aimed at. A foreign language cannot be taught without, in some degree, employing that language in the teaching of it. The legislature could properly have defined language as a subject contemplated to be within the scope of the phrase "all school branches." We cannot say that the legislature did not so use the phrase. The term "school branches" has no strictly limited meaning. Under the title of the act, no one denies but that it is proper to require that reading, writing and spelling shall be taught in English only. How,



then, could a foreign language be taught, except in a very limited degree, without teaching reading, writing, and spelling in that language? The means of teaching a foreign language are so interrelated with the problem of requiring all school branches to be taught in English, only, that a provision in the statute, regulating the teaching of foreign languages, seems to us to be entirely consistent with the subject as expressed in the title, and a provision properly calculated to aid in carrying out the expressed object sought to be attained.

The judgment of the lower court is therefore reversed and the action dismissed.

Reversed and dismissed.

136 MORRISSEY, *C. J.*, dissenting:

Chapter 61, Laws 1921, in the main, is calculated to prohibit and penalize the teaching, in a school, of languages other than English. The history of the ages dead and gone reveals that every forward step in science and philosophy met with opposition and oftentimes with persecution, but, notwithstanding this opposition, learning spread, the human mind expanded, and knowledge of the arts and sciences reached the multitude. We have been wont to look upon the prescriptions of the past with charity because of the age in which they occurred, but, now in the twentieth century, the majority opinion sustains a statute as a reasonable exercise of the police power that prescribes the teaching of modern languages, in a school, although it sanctions the teaching of such languages if done by a private tutor, or a parent, in the home. If the teaching of such languages is vicious and harmful, it must be so when done by a private tutor, or by a parent, in the home. If not hurtful to the state when taught by a private tutor or by a parent, in the home, how can it be said to be harmful to the state when taught in a school, when such teaching is not permitted to impair the work of the child in the common branches of learning. I cannot regard as a reasonable exercise of the police power a provision which arbitrarily forbids the acquisition of useful learning—learning that is not harmful in itself, learning that the well to do parent may employ a private tutor to impart to his child, or that the cultured parent may personally impart to his child, if not done in a school. The police power has never been held to extend to the prohibition of acts not injurious to society or which cannot reasonably be said to be harmful to the public welfare. It is an arbitrary classification which reason will not support. The provision declaring the English language to be the official lan-

137 guage of the state and the provisions requiring the teaching of that language in all schools of the state are proper, and no person complains of them or questions their validity, but those provisions that prohibit the teaching of other languages, in a school, even though such teaching does not interfere with the school course prescribed by proper authority, in my judgment, violate the provisions of both the state and federal constitutions. I, therefore, dissent from the holding announced and adhere to the opinion of this court in *Nebraska District of Evangelical Lutheran Synod v. Me-*



Kelvie, 104 Neb. 93, and to the dissenting opinion in Meyer v. State, 107 Neb. —.

138 And afterwards, to wit, on the 17th day of May, 1922, there was filed in the office of the Clerk of said Supreme Court, a certain Motion for Rehearing in the words and figures following, to wit:

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, etc., Appellees,

vs.

SAMUEL R. MCKELVIE et al., Appellants.

*Motion for Rehearing.*

Come now Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other states, Diederick Siefkin and John Siedlik, appellees, and move the court that a rehearing of this cause be granted for the following reasons:

1. In holding that Chapter 61 of the Laws of 1921 was a reasonable exercise of the police power this court overlooked the provisions of the Constitution of the State of Nebraska and the Constitution of the United States.

2. In holding that Chapter 61 of the Laws of 1921 was a reasonable exercise of the police power this court overlooked the adjudicated cases of this court and also of the Supreme Court of the United States.

3. In holding that the provisions of Chapter 61 of the Laws of 1921 were constitutional this court did not properly interpret the provisions of Section 1 of the 14th Amendment to the Constitution of the United States.

4. In holding that the provisions of Chapter 61 of the Laws of 1921 were constitutional this court did not properly interpret Section 4 of the Enabling Act, passed by the Congress of the United States on April 19, 1864.

5. This court erred in holding that the provisions of Chapter 61 of the Laws of 1921 did not violate the provisions of Section 1 of the 14th Amendment to the Constitution of the United States.

139 6. This court erred in holding that Chapter 61 of the Laws of 1921 did not violate the provisions of Section 4 of the Nebraska Enabling Act passed by Congress on April 19th, 1864.

7. This court erred in holding that Chapter 61 of the Laws of 1921 did not violate the various provisions of the Constitution of the State of Nebraska as alleged in the briefs of appellees.

ALBERT & WAGNER,

SANDALL & WRAY,

ARTHUR F. MULLEN,

*Attorneys for Appellees.*

Endorsed: 22424. In the Supreme Court of Nebraska. Nebraska District of Evangelical Lutheran Synod of Missouri, etc., Appellees vs. Samuel R. McKelvie et al., Appellants. Motion for rehearing Supreme Court of Nebraska. Filed May 17, 1921. H. C. Lindsay, Clerk.

And afterwards, to wit, on the 18th day of May, 1922, there was rendered by said Supreme Court and entered of record upon the journal thereof, a certain Order in the words and figures following, to wit:

Supreme Court of Nebraska, January Term, A. D. 1922, May 18,

No. 22424.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF Missouri, Ohio and Other States et al., Appellees & Cross-Appellants,

v.

SAMUEL R. MCKELVIE et al., Appellants & Cross-Appellees.

Appeal from the District Court of Platte County.

This cause coming on to be heard upon motion of appellees for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, ordered and adjudged that said motion for rehearing be, and same hereby is, overruled and a rehearing herein denied.

A. M. MORRISSEY,  
*Chief Justice.*

140 And afterwards, to wit, on May 18, 1922, there was filed in the office of the Clerk of the Supreme Court of Nebraska, a certain Petition for a Writ of Error herein, which original petition marked "Exhibit A" is attached hereto and forms a part of the return to the writ of error.

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EXHIBIT A. H. C. Lindsay, Clerk.

In the Supreme Court of the State of Nebraska.

General Number 22424.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF Missouri, Ohio, and Other States, Dietrick Siefken, and John Siedlik, Plaintiffs in Error,

vs.

SAMUEL R. MCKELVIE, CLARENCE A. DAVIS, OTTO F. WALTER, and Their Deputies, Subordinates, and Assistants, Defendants in Error.

*Petition for Writ of Error.*

To the Honorable Andrew M. Morrissey, Chief Justice of the Supreme Court of the State of Nebraska, and to the Associate Judges of said court:

The Plaintiffs in error, Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other states, Dietrick Siefken, and John Siedlik, show by this petition that on the 19th day of April, 1922, in the said Supreme Court of the State of Nebraska, a judgment was rendered against the plaintiffs in error in a suit wherein the said Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other states and Dietrick Siefken were plaintiffs and appellces, and John Siedlik was an intervenor and appellee, and the said Samuel R. McKelvie, Clarence A. Davis, Otto F. Walter, were defendants and appellants, and thereafter a motion for a rehearing was filed, presented, considered, and on the 18th day of May, A. D. 1922, denied by the court, whereupon said judgment became and is final; that the court rendering the same is the highest court of said State in which a decision could be had in this suit, and thereby a manifest error has occurred, greatly to the damage of the plaintiffs in error.

That, as appears in the record, proceedings and decision of the Supreme Court there was drawn in question in said proceeding the validity of a statute of the State of Nebraska, to-wit, Chapter 61 of the Laws of 1921, on the ground that the provisions of the aforesaid statute were unconstitutional and invalid as being repugnant to the provisions of the fourteenth amendment to the Constitution of the United States, and in contravention thereof; that the provisions of said statute were unconstitutional and invalid as being repugnant to the provisions of section 4 of an act passed by the Congress of the United States on April 19, 1864, known as the Enabling Act admitting Nebraska to Statehood, and in contravention thereof, and the decision of said court was in favor of the validity of the aforesaid statutes, all of which fully appears in the records and proceedings of the case, and is specifically set forth in the Assignment of Errors filed herewith.

Wherefore, petitioners in error severally pray that a writ of error be allowed; and that a transcript of the record, proceedings and papers upon which said decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, under the rules of said court in such cases made and provided, and that the same may be by said honorable court inspected and corrected in accordance with law and justice, and your petitioners in error further pray that the proper order relating to the required security to be required of them may be made.

ALBERT & WAGNER,  
SANDALL & WRAY,  
ARTHUR F. MULLEN,

*Solicitors for the Plaintiffs in Error.*

143 [Endorsed:] General Number 22424. In the Supreme Court of the State of Nebraska. Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other States, Dietrick Siefken, and John Siedlik, Plaintiffs in Error, vs. Samuel R. McKelvie, Clarence A. Davis, Otto F. Walter, and their Deputies, Subordinates, and Assistants, Defendants in Error. Petition for Writ of Error. Albert & Wagner, Sandall & Wray, Arthur F. Mullen, Solicitors for Plaintiffs in Error. Supreme Court of Nebraska. Filed May 18, 1922. H. C. Lindsay, Clerk.

144 And on the same day, to wit, May 18, 1922, there was filed in the office of the Clerk of the Supreme Court of Nebraska, certain Assignments of Error, which original assignments of error, marked "Exhibit B," is attached hereto and forms a part of the return to the writ of error herein.

145 EXHIBIT B. H. C. Lindsay, Clerk.

In the Supreme Court of the State of Nebraska.

General Number 22424.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, Ohio, and Other States, Dietrick Siefken, and John Siedlik, Plaintiffs in Error,

VS.

SAMUEL R. MCKELVIE, CLARENCE A. DAVIS, OTTO F. WATLER, and Their Deputies, Subordinates, and Assistants, Defendants in Error.

*Assignment of Errors.*

Come now the plaintiffs in error in the above entitled cause, and aver and show that in the record and proceedings in said cause the Supreme Court of the State of Nebraska erred to the grievous injury and wrong of the plaintiffs in error herein, and to the prejudice, and

against the rights of the plaintiffs in error, in the following particulars, to-wit:

1. The said Supreme Court erred in holding that Sections 2, 3, 4, 5 of the Laws of Nebraska for 1921, and each of them, are constitutional and not contrary to the provisions of Section 1 of the fourteenth amendment to the Constitution of the United States.

2. The said Supreme Court erred in not holding that Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921 were invalid and unconstitutional and in violation of Section 1 of the fourteenth amendment to the Constitution of the United States.

3. The said Supreme Court erred in holding that the provisions of Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921, did not operate to deprive these plaintiffs in error of their liberty without due process of law.

4. The said Supreme Court erred in holding that the provisions of Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921 did not operate to deprive these plaintiffs in error of their property without due process of law.

146 5. That the said Supreme Court erred in holding that Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921, were not an unreasonable restraint upon the liberty of the plaintiffs in error, and an unjust discrimination against said plaintiffs.

6. That the said Supreme Court erred in holding that the provisions of Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921 did not deny to the plaintiffs in error the equal protection of the law.

7. The said Supreme court erred in holding that sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921 were a valid and reasonable exercise of the police power.

8. The said Supreme Court error in holding sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921 did not validate and contravene the provisions of the Nebraska Enabling Act passed by Congress April 19, 1864. The act among other things provides as follows:

"Section 4. \* \* \* "And provided further, That said constitution shall provide, by an article forever irrevocable, without the consent of the Congress of the United States: \* \* \* Second: That perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship."

9. The said Supreme Court erred in holding that Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska, for 1921 did not interfere with the mode of public worship of the plaintiffs in error.

10. The said Supreme court erred in holding that Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921, did not interfere with the rights of conscience of the plaintiffs in error.

Wherefore, for these and other manifest errors appearing in the record, the said Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other States, Dietrich Siefken, and John Siedlik, plaintiffs in error, severally pray that the judgment of the said Supreme Court of Nebraska be reversed and set aside and held for naught, and that judgment be rendered for plaintiffs in error, granting them their rights under the statutes and laws of the

147 United States, and plaintiffs in error also pray judgment for their costs.

ALBERT & WAGNER,

SANDALL & WRAY,

ARTHUR F. MULLEN,

*Attorneys for Plaintiffs in Error.*

148 [Endorsed:] General Number 22424. In the Supreme Court of the State of Nebraska. Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other States, Dietrich Siefken, and John Siedlik, Plaintiffs in Error, vs. Samuel R. McKelvie, Clarence A. Davis, Otto F. Walter, and their Deputies, Subordinates, and Assistants, Defendants in Error. Assignment of Errors. Albert & Wagner, Sandall & Wray, Arthur F. Mullen, Solicitors for Plaintiffs in Error. Supreme Court of Nebraska. Filed May 18, 1922. H. C. Lindsay, Clerk.

149 And on the same day, to wit, May 18, 1922, Hon. A. M. Morrissey, Chief Justice of the Supreme Court of the State of Nebraska, entered an order allowing a writ of error herein and fixing supersedeas bond at the sum of \$2,000, said original allowance of the writ of error, marked "Exhibit C", is attached hereto and forms a part of the return to the writ of error.

150 EXHIBIT C. H. C. Lindsay, Clerk.

In the Supreme Court of the State of Nebraska.

General Number 22424.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, Ohio, and Other States, Dietrich Siefken, and John Siedlik, Plaintiffs in Error,

vs.

SAMUEL R. MCKELVIE, CLARENCE A. DAVIS, OTTO F. WALTER, and Their Deputies, Subordinates, and Assistants, Defendants in Error.

*Allowance of Writ.*

Come now the plaintiffs in error, Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other States, Diederich Sief-

ten, and John Siedlik, on this 18th day of May, 1922, and file and present to this court, their petition, praying for the allowance of writ of error intended to be urged by them; and praying further that a duly authenticated transcript of the records, proceedings and papers upon which the judgment herein was rendered, may be sent to the Supreme Court of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desires to give plaintiffs in error an opportunity to test in the Supreme Court of the United States, the questions therein presented, it is ordered by this court that a writ of error be allowed, as prayed, providing however, that the said plaintiffs in error give bond according to law in the sum of two thousand Dollars (\$2,000.00), which said bond shall operate as a supersedeas bond.

In testimony whereof witness my hand this 18th day of May, 1922.

A. M. MORRISSEY,  
Chief Justice of the Supreme Court  
of the State of Nebraska.

151 And on the same day, to wit, May 18, 1922, there was filed in the office of the Clerk of said Supreme Court of Nebraska, a certain Supersedeas Bond, which bond was duly approved by the Chief Justice of said Court, and copy of said bond and approval of the said Chief Justice, marked "Exhibit D," is hereto attached and forms a part of the return to the writ of error.

152 EXHIBIT D. H. C. Lindsay, Clerk.

In the Supreme Court of the State of Nebraska.

General Number 22424.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, Ohio, and Other States, Dietrich Siefken, and John Siedlik, Plaintiffs in Error,

vs.

SAMUEL R. McKELVIE, CLARENCE A. DAVIS, OTTO F. WALTER, and Their Deputies, Subordinates, and Assistants, Defendants in Error.

*Bond on Writ of Appeal.*

Know all men by these presents: That we, Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other States, Dietrich Siefken, of the County of Platte, and John Siedlik of the County of Douglas, State of Nebraska, as principals, and Otto H. Sunderman and Charles C. Ehlers, of the County of and Lancaster, of the County of as sureties, are held and firmly bound



unto the above named Samuel R. McKelvie, Clarence A. Davis, Otto F. Walter, in the sum of Two thousand (\$2,000.00) Dollars, to be paid to them and for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 18th day of May, in the year of our Lord, one thousand nine hundred and twenty-two.

Whereas, the above named Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other States, Dietrich Siefken, and John Siedlik, plaintiffs in error, seek to prosecute their writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Nebraska.

153 Now, therefore, the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their writ of error to effect and answer all costs and damages that may be adjudged, if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and virtue.

NEBRASKA DISTRICT OF EVANGELICAL  
LUTHERAN SYNOD OF MISSOURI, OHIO,  
AND OTHER STATES AND DIETRICH  
SIEFKEN,

By ALBERT & WAGNER,  
SANDALL & WRAY,  
ARTHUR F. MULLEN,

*Their Solicitors.*

JOHN SIEDLIK,  
By ARTHUR F. MULLEN,  
*His Solicitor.*

O. H. SUNDERMAN.  
CHARLES C. EHLERS.

STATE OF NEBRASKA,  
*County of Lancaster, ss:*

O. H. Sunderman and Charles C. Ehlers, whose names are subscribed as sureties to the above bond, being severally and duly sworn each for himself says, that he is a resident and freeholder of the State of Nebraska and is worth more than the sum in said bond specified as the penalty thereof, over and above all his just debts and liabilities, in property not by law exempt from execution in this State.

O. H. SUNDERMAN.  
CHARLES C. EHLERS.

Subscribed and sworn to before me this 18 day of May, A. D., 1922.

[SEAL.]

H. C. LINDSAY,  
*Clerk Supreme Court Nebraska.*



This bond approved this 18 day of May, 1922.

A. M. MORRISSEY,  
*Chief Justice of the Supreme Court  
of the State of Nebraska.*

Endorsed: 22424. Nebraska District of Evangelical Lutheran Synod of Missouri, etc., v. McKelvie. Supersedeas Bond. Supreme Court of Nebraska. Filed May 18, 1922. H. C. Lindsay, Clerk.

154 And on the same day, to wit, May 18, 1922, the Hon. A. M. Morrissey, Chief Justice of the Supreme Court of Nebraska, entered a further order of allowance of the writ of error herein, which original order, marked "Exhibit E," is attached hereto and forms a part of the return to said writ of error herein.

155 EXHIBIT E. H. C. Lindsay, Clerk.

In the Supreme Court of Nebraska.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO, and Other States, Dietrick Siefken, and John Siedlik, Plaintiffs in Error,

vs.

SAMUEL R. MCKELVIE, CLARENCE A. DAVIS, OTTO F. WALTER, and Their Deputies, Subordinates, and Assistants, Defendants in Error.

*Order of Allowance of Writ of Error.*

On this 18th day of May, 1922, the applications of Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio, and other States, Diederick Siefken, and John Siedlik, plaintiffs in error in this action, for a writ of error, came on to be heard, said plaintiffs in error being represented by counsel and it appearing to the court from the application filed herein, and from the record filed therewith, that the application should be granted, and that a transcript of the record, proceedings and papers, upon which the judgment of the court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed, in order that such proceedings may be had as may be just.

Now, therefore, it is ordered that the writ of error be allowed upon bond being furnished by the plaintiffs in error, conditioned according to law, in the sum of \$2,000.00, and that said bond operate as a supersedeas; that the said plaintiffs in error having executed the bond in the sum of \$2,000.00, as provided by law, and the clerk is hereby directed to stay the mandate of the Supreme Court of the State of Nebraska, until further order by the United States Supreme Court, and that a true copy of the record, assignment of errors, and all proceedings in the case in the Supreme Court of the State of Nebraska shall be transmitted to the Supreme Court of the United States, duly certified, according to law, in order that said court may

inspect the same and take such action thereon as it deems proper according to law.

A. M. MORRISSEY,

*Chief Justice of the Supreme Court of Nebraska.*

156 And on the same day, to wit, May 18, 1922, there was issued by the Supreme Court of the United States, a certain Writ of Error herein, which original writ of error with the allowance of the Chief Justice of the State of Nebraska endorsed thereon, is attached hereto, marked "Exhibit F," and forms a part of the return to said writ of error.

157

EXHIBIT F. H. C. Lindsay, Clerk.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Nebraska, Greeting:

Because, in the record and the proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Nebraska, before you, at the April sitting of the January term, 1922 thereof, being the highest court of law or equity of said State, in which a decision could be had in the said suit between Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio, and other states, Dietrich Siefken, and John Siedlik, plaintiffs in error, and Samuel R. McKelvie, Clarence A. Davis, Otto F. Walter, and their deputies, subordinates and assistants, defendants in error, wherein was drawn in question the validity of Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921, a statute of said State, on the ground of its being repugnant to the Constitution, and laws of the United States, and the decision was in favor of its validity, and thereby a manifest error hath happened to the great damage of the said Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other states, Dietrich Siefken, and John Siedlik, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty (30) days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this 18th day of May, in  
158 the year of our Lord, one thousand nine hundred and twenty-two.

Done in the city of Lincoln and County of Lancaster, State of Nebraska, with the seal of the District Court of the United States for the District of Nebraska.

[Seal United States District Court, District of Nebraska.]

R. C. HOYT,  
*Clerk of the District Court of the United  
 States for the District of Nebraska,*  
 By J. H. McCLAY,  
*Deputy.*

Allowed by  
 A. M. MORRISSEY,  
*Chief Justice of the Supreme Court  
 of the State of Nebraska.*

May 18, 1922.

[Endorsed:] 22424. Nebraska District of Evangelical Lutheran Synod of Missouri, etc., v. McKelvie. Writ of Error. Supreme Court of Nebraska. Filed May 18, 1922. H. C. Lindsay, Clerk.

159 And on the same day, to wit, May 18, 1922, there was issued out of the Supreme Court of the State of Nebraska, a certain Citation, which original citation, with acceptance of service thereof endorsed thereon, is attached hereto, marked "Exhibit G," and forms a part of the return to the writ of error herein.

160 EXHIBIT G. H. C. Lindsay, Clerk.

THE UNITED STATES OF AMERICA:

The President of the United States to Samuel R. McKelvie, Clarence A. Davis, Otto F. Walter, and their Deputies, Subordinates, and Assistants, of Nebraska, Greeting:

You and each of you are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error, filed in the office of the Clerk of the Supreme Court of the State of Nebraska, wherein Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other States, Dietrich Siefken, and John Siedlik are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the chief justice of the Supreme Court of the State of Nebraska, this 18th day of May, 1922.

A. M. MORRISSEY,  
*Chief Justice of the Supreme Court  
of the State of Nebraska.*

Attest:

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,  
*Clerk of the Supreme Court  
of the State of Nebraska.*

COUNTY OF LANCASTER,  
*State of Nebraska, ss:*

May 18, 1922.

I, the undersigned attorney of record for the defendants in error of the above entitled cause, hereby acknowledge due service of the above citation, and enter appearance for said defendants in error in the Supreme Court of the United States.

CLARENCE A. DAVIS,  
*Attorney General,  
Atty. for Defendants in Error.*

[Endorsed:] 22424. Nebraska District of Evangelical Lutheran Synod of Missouri, etc., v. McKelvie. Citation and proof of service. Supreme Court of Nebraska. Filed May 18, 1922. H. C. Lindsay, Clerk.

161 And on the same day, to wit, May 18, 1922, there was filed on behalf of the Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other States et al., a Præcipe for the record to be prepared by the Clerk of the said Supreme Court as a return to writ of error herein, which said original præcipe, with acceptance of service thereof endorsed thereon, marked "Exhibit H," is attached hereto and forms a part of the return to the writ of error herein.

162

EXHIBIT H. H. C. Lindsay, Clerk.

In the Supreme Court of Nebraska.

General Number 22424.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF Missouri, Ohio, and other States, Diederick Siefkin, and John Siedlik, Appellees,

vs.

SAMUEL R. MCKELVIE, CLARENCE A. DAVIS and OTTO F. WALTER, and Their Deputies, Subordinates, and Assistants, Appellants.

*Præcipe.*

To the Clerk of the Supreme Court of Nebraska:

You are advised that the undersigned intend to take an appeal to the Supreme Court of United States in the above case, and we desire you to prepare a transcript including therein the following:

1. Petition of plaintiffs (trans. 1-9).
2. Order allowing injunction (trans. 9-10).
3. Petition of intervention of Siedlik (trans. 14-19).
4. Answer of McKelvie, Davis and Walter (trans. 29-31).
5. Answer of McKelvie, Davis and Walter to petition of intervention (trans. 32-33).
6. Reply of plaintiffs (trans. 34).
7. Decree of District Court (trans. 35).
8. Appellants' assignment of errors in Supreme Court (11-12 of appellants' brief).
9. Appellees' assignment of errors in Supreme Court on cross appeal (page 18 appellees' brief).
10. Appellees' amended assignment of errors in Supreme Court (pp. 1-4 separate brief of Appellees' amended assignment).
11. Intervenor Seidlick assignment of errors (pp. 2-5 of Seidlick intervenor's brief).
12. Judgment of the Supreme Court.
13. Majority of opinion Supreme Court.
14. *Dissented* opinion Supreme Court.
15. Bill of exceptions.
16. Motion for rehearing.
17. Order on same.
18. Bond given in Supreme Court.

ALBERT & WAGNER,  
SANDALL & WRAY,  
ARTHUR F. MULLEN,  
*Attorneys for the Appellees.*

163 STATE OF NEBRASKA,  
County of Lancaster, ss:

I, the undersigned attorney of record for the defendants in error in the above entitled cause hereby acknowledge receipt of a copy of the above præcipe and acknowledge due service of the above præcipe on this 18th day of May, 1922.

CLARENCE A. DAVIS,  
*Attorney for the Defendants in Error.*

[Endorsed:] 22424. Nebraska District of Evangelical Lutheran Synod of Missouri, etc., v. McKelvie. Præcipe. Supreme Court of Nebraska. Filed May 18, 1922. H. C. Lindsay, Clerk.

164 And afterwards, to wit, on May 19, 1922, there was filed in the office of the Clerk of the Supreme Court of Nebraska by Clarence A. Davis, attorney general, in behalf of Samuel R. McKelvie et al., a Præcipe for additional matter to be incorporated into the return to said writ of error, which said original additional Præcipe, marked "Exhibit I," is attached hereto and forms a part of the return to the writ of error herein.

165 EXHIBIT J. H. C. Lindsay, Clerk.  
In the Supreme Court of Nebraska.

Gen. No. 22424.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO, and Other States, Diederick Siefkin, and John Siedlik, Appellees,

vs.

SAMUEL R. MCKELVIE, CLARENCE A. DAVIS and OTTO F. WALTER, and Their Deputies, Subordinates, and Assistants, Appellants.

*Appellants' Præcipe.*

To the Clerk of the Supreme Court of Nebraska:

In addition to the portions of the record desired by the Appellees to be inserted in the transcript set forth in Appellees' præcipe filed May 18, 1922, the Appellants request the inclusion of the following portions of the record in said transcript:

(a) Application of American Legion, Department of Nebraska for leave to appear as amicus curiæ.

(b) Journal entry of the Supreme Court granting leave to the American Legion to appear as amicus curiæ.

(c) Demurrer of defendant, Otto F. Walter, dated June 22, 1921. (Page 24 of Transcript.)

(d) Order of the District Court, dated July 21, 1921, overruling the demurrer of the defendant, Otto F. Walter. (Page 28 of Transcript.)

CLARENCE A. DAVIS,  
*Attorney General,*  
*Attorney for Appellants.*

May 19, 1922.

165½ [Endorsed:] 22424. Nebraska District of Evangelical Lutheran Synod of Missouri, etc., v. McKelvie. Præcipe of Atty. Genl. Supreme Court of Nebraska. Filed May 19, 1922. H. C. Lindsay, Clerk.

166

*Certificate of Lodgment.*

STATE OF NEBRASKA, ss:

Supreme Court.

I, H. C. Lindsay, Clerk of said Court, do hereby certify that there was lodged with me as such Clerk on May 18, 1922, in the case of Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other states, Diederick Siefkin and John Siedlik v. Samuel R. McKelvie, Clarence A. Davis and Otto F. Walter and their deputies, subordinates and assistants, No. 22424—

1. The original bond of which a copy is herein set forth.
2. Four copies of the writ of error as herein set forth—one for each of the defendants and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Lincoln, Nebraska, this June 7, 1922.

[Seal of the Supreme Court of Nebraska.]

H. C. LINDSAY,  
*Clerk of Supreme Court of Nebraska.*

167

*Authentication of Record.*

STATE OF NEBRASKA, ss:

Supreme Court.

I, H. C. Lindsay, Clerk of said Court and custodian of the files and records thereof, do hereby certify that the foregoing pages numbered from 1 to 139, inclusive, are a true, full and complete transcript of the record and proceedings mentioned and described in the præcipes filed in my office requesting this record in the case of

Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other states, Diederick Siefkin and John Siedlik v. Samuel R. McKelvie, Clarence A. Davis and Otto F. Walter and their deputies, subordinates and assistants, No. 22424, the same being an appeal from the district court of Platte county, Nebraska, and also of the opinion of the court rendered therein as the same now appear on file and of record in my office.

In testimony whereof, I have hereunto set my hand and officially affixed the seal of said court at my office in Lincoln, Nebraska, this June 7, 1922.

[Seal of the Supreme Court of Nebraska.]

H. C. LINDSAY,  
*Clerk Supreme Court of Nebraska.*

168

*Return to Writ of Error.*

UNITED STATES OF AMERICA, ss:

Supreme Court of Nebraska.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified copy of the following portions of the transcript from the district court filed in my office in the case of Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other states, Diederick Siefkin and John Siedlik v. Samuel R. McKelvie, Clarence A. Davis and Otto F. Walter and their deputies, subordinates and assistants, No. 22424, to wit:

1. Petition of plaintiffs. 2. Order allowing injunction. 3. Petition of Intervention of Siedlik. 4. Demurrer of defendant Walter. 5. Order of July 21, 1921, overruling demurrer of Walter. 6. Answer of McKelvie, Davis and Walter. 7. Answer of McKelvie, Davis and Walter to petition of intervention. 8. Reply of plaintiffs. 9. Decree of district court.

I also herewith transmit to the Supreme Court of the United States a duly certified copy of the bill of exceptions filed in the Supreme Court of Nebraska, and the following portions of the record and proceedings in said case in the Supreme Court of Nebraska, to wit: 1. Application of American Legion for leave to appear as amicus curiæ. 2. Journal entry allowing American Legion to appear as amicus curiæ. 3. Appellants' assignment of errors in Supreme Court. 4. Appellees' assignment of errors in Supreme Court on cross-appeal. 5. Appellees' amended assignment of errors in Supreme Court. 6. Intervenor Siedlik's assignment of errors. 7. Judgment of Supreme Court. 8. Opinion of Supreme Court, including dissenting opinion of Morrissey, C. J. 9. Motion for rehearing. 10. Order overruling motion for rehearing.

I also transmit the original petition for a writ of error herein;



original assignment of errors; allowance of writ; copy of supersedeas bond; allowance of writ; original writ of error; original citation; original præcipe for this record; præcipe of attorney general for additional record, the above and foregoing items comprising  
 169 all matters and things requested in said præcipes to be made a part of this return to writ of error herein.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court of Nebraska, in the City of Lincoln, this 7th day of June, 1922.

[Seal of the Supreme Court of Nebraska.]

H. C. LINDSAY,

*Clerk Supreme Court of Nebraska.*

Fees:

Charge for this record...	\$37.00
Clerk filings, etc.....	3.05
	<hr/>
	40.05

Paid by Arthur F. Mullen.

H. C. LINDSAY,  
*Clerk.*

Endorsed on cover: File No. 28,990. Nebraska Supreme Court. Term No. 440. Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio, and other States et al., plaintiff in error, vs. Samuel R. McKelvie, Clarence A. Davis, Otto F. Walter, and their deputies, subordinates and assistants. Filed June 22, 1922. File No. 28,990.

607-131521

WM. E. STANSBURY

IN THE

# United States Supreme Court

NEBRASKA DISTRICT OF EVANGELICAL  
LUTHERAN SYNOD OF MISSOURI,  
OHIO, AND OTHER STATES, ET AL.  
*Plaintiffs in Error.*

VS.

SAMUEL R. McKELVIE, CLARENCE A.  
DAVIS, OTTO F. WALTER AND THEIR  
DEPUTIES, SUBORDINATES, AND  
ASSISTANTS,  
*Defendants in Error.*

No. 440

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

I. L. ALBERT,  
ARTHUR F. MUILEN,

*Attorneys for Plaintiffs in Error.*

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IN THE

**United States Supreme Court**

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NEBRASKA DISTRICT OF EVANGELICAL  
LUTHERAN SYNOD OF MISSOURI,  
OHIO, AND OTHER STATES, ET AL,  
*Plaintiffs in Error,*

vs.

SAMUEL R. McKELVIE, CLARENCE A.  
DAVIS, OTTO F. WALTER AND THEIR  
DEPUTIES, SUBORDINATES, AND  
ASSISTANTS,

*Defendants in Error.*

No. 440

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**BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.**

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**NATURE OF THE CASE.**

The Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio, and other states and Dietrich Siefken, as plaintiffs, and John Siedlik, as an intervenor, the plaintiffs in error herein, began this proceeding in the District Court of Platte County, Nebraska, to enjoin Samuel R. McKelvie, Governor of Nebraska, Clarence A. Davis, attorney general of Nebraska, and Otto F. Walter, county attorney of Platte County, Nebraska, defendants in error herein, from en-

forcing the provisions of sections 2, 3, 4 and 5 of an act passed in 1921, which act is known as Chapter 61 of the Laws of Nebraska for 1921 and omitting immaterial matters, is as follows (Transcript, p. 5):

Section 1. The English language is hereby declared to be the official language of this state, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denominational and parochial schools.

Section 2. No person, individually or as a teacher, shall, in any private, denominational, or parochial or public school, teach any subject to any person in any language other than the English language.

Section 3. Languages other than the English language may be taught as languages only, after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county or the city superintendent of the city in which the child resides. Provided, that the provisions of this act shall not apply to schools held on Sunday or on some other day of the week which those having the care and custody of the pupils attending same conscientiously observe as the Sabbath, where the object and purpose of such schools is the giving of religious instruction, but shall apply to all other schools and to schools held at all other times. Provided that nothing in this act shall prohibit any person from teaching his own children in his own home any foreign language.

Section 4. It shall be unlawful for any organization whether social, religious or commercial, to prohibit, forbid or discriminate against the use of the English language in any meeting, school or proceeding, and for any officer, director, member or person in authority in any organization to pass, promulgate, connive at, pub-

lish, enforce or attempt to enforce any such prohibition or discrimination.

Section 5. Any public official, teacher, instructor, or other person who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof be fined in any sum not exceeding one hundred (\$100.00) Dollars or less than twenty-five (\$25.00) Dollars, or be confined in the county jail for a period not exceeding thirty days for each offense.

The trial judge granted an injunction restraining the defendants in error from enforcing the act insofar as it related to the giving of religious instruction. (Trans., p. 19). The defendants in error appealed from this decision. The Supreme Court of Nebraska reversed the decision of the trial court and denied the injunction. (Trans., p. 81.) Thereafter, a motion for a rehearing was filed in said Supreme Court (Trans., p. 87), which motion on the 18th of May, 1922, was overruled (Trans., p. 88). From this order and judgment the plaintiffs in error have carried this cause to this court for review by writ of error (Trans., pp. 89-98 incl.).



## **CONTENTION AND PLEADINGS.**

Plaintiffs in error contend that sections 2, 3, 4 and 5 of the act in question violates the provisions of the 14th amendment to the Constitution of the United States, and also the provisions of the Enabling Act admitting Nebraska into the Union. The Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio and other states and Dietrich Siefken began this proceeding for the purpose of securing an injunction. A copy of their petition appears Transcript, pp. 2-8 inclusive. The intervenor, John Siedlik, joined with the other plaintiffs in error in their application for relief. His petition of intervention appears Transcript pp. 9-12 inclusive. Answers were filed by the defendants in error (Trans., pp. 14-18 incl.). A copy of the evidence introduced at the trial appears Transcript, pp. 22-70 inclusive.

The issues presented for decision are solely matters of law. There is no issue of fact to be passed on by this court.

## **FACTS PROVED.**

The allegations of the petition of the Nebraska Evangelical Lutheran Synod of Missouri, Ohio, and other states have been proven without conflict. The testimony of intervenor Siedlik and the witness Kalamaja (Trans., pp. 46 to 58 inclusive), establish without conflict all the allegations made in intervenor's petition, which is in substance as follows:

“That the intervenor is a naturalized citizen of the United States, was born in Poland about thirty-nine years ago, and at the present time and for more than five years last past has been a resident taxpayer of and elector in the State of Nebraska.

That intervenor is now and for many years last past has been a member of St. Francis Parish in South Omaha, Nebraska, and is a communicant of the Roman Catholic church.

That intervenor has a family, consisting of his wife and five children; that intervenor's wife was born in Poland; that at the time intervenor came to this country he could not speak the English language; that the wife of this intervenor cannot speak the English language at the present time; that intervenor has acquired a working knowledge of the English language insofar as it relates to business and every day affairs; that in religious matters he has not acquired sufficient knowledge of the English language to either give or receive instructions in religion and morality in said language; that the language used in his home is Polish; that all of the children in said home, in communicating with the intervenor and his wife, use the Polish language.

That it is the religious duty of this intervenor and his wife to instruct their children in religion and morals and that such instruction has been given and is now being given by this intervenor and his wife in said Polish language, and that it is impossible for this intervenor or his wife to give religious instruction to their children in any other language.

That intervenor, as a part of the plan of educating his children, has contributed over \$500.00 to the erection and support of a parochial school in the aforesaid parish and is now and for more than five years last past has contributed fifty cents a month for each child attending said school for the support and maintenance of said school; that his children have attended and are now attending said school; that all of the expense of erecting, maintaining and supporting said school is borne by this intervenor and other persons of Polish birth or descent; that no part of the public revenues is used to support said school; that one of the reasons for maintaining said parochial school is to educate the children

there in matters of faith and morals and, in particular, in the doctrines and discipline of the Roman Catholic Church; that the course of study in said school, insofar as the secular branches are concerned, is substantially the equivalent of the public schools in the same community; that the purpose and object of said school is to educate and train the children to understand, speak and use the English language and to educate them so that they will be useful and competent citizens of the United States; that said school has a regular course of study and employs the English language in the instruction of the children, but in addition thereto, in the lower grades, prior to the passage of the Act in question, taught the Polish language and gave religious instruction to the children in Polish; that the Polish language was used for the purpose of teaching the children English and to instruct said children in matters of religion and morality until said children had a working knowledge of the English language; that after said children had acquired a working knowledge of the English language no instruction was given either in the Polish language or in any subject in said language; that all the instruction given to the children in said school, after children reach seventh grade all instruction is in English language, and no Polish is used above the sixth grade; that the children who complete the regular work in said school have been admitted without examination to the schools of the city of Omaha and other schools of equal grade; that said school was and is one of the accredited schools of learning in the city of Omaha.

That it is the intention and purpose of intervenor to have his children educated in the English language and also to have them acquire a working knowledge of the Polish language, so that they can receive information and be instructed in faith and morals in both the Polish language and the English language.

That it is impossible for the teachers in said school to give religious instruction properly to the children in

the lower grades in the English language if said children are denied the right to receive a rudimentary education in Polish, and it is impossible for this intervenor and his wife to instruct his children properly in faith and morals and thereby discharge an obligation that is imposed upon them as a matter of conscience; that it is impossible for said children to communicate properly with their teachers and with their mother without using the Polish language.

Intervenor alleges that when he contributed to the expense of creating said school and when he contributes to the support and maintenance of the same, it was and is with the intention and understanding that the rudiments of the Polish language be taught to his children in said school and that religious instruction be given to the children therein, who do not understand English, in the Polish language, until said children can acquire a sufficient working knowledge of the English language to understandingly take instruction in said language; that he has children attending said school below the eighth grade that do not have sufficient knowledge of the English language to intelligently receive instruction in the English language; that it is impossible to instruct said children without using the Polish language."

The following excerpt from the testimony of Siedlik illustrates the difficulty and demonstrates the impossibility of giving proper instruction without using the language of the home (Trans., p. 49):

"Q. Do they speak Polish?

A. Yes.

Q. Do you want your children to study them?

A. Yes, sure.

O. And in English?

A. Yes.

Q. Do you want your children to be instructed in religion in your school?

A. Yes, ma'am.

Q. Do you want your children instructed in that in whatever language they understand it, whether English or Polish, in the language that they can understand religion?

A. (No answer).

Q. Do you want the children to understand their instruction?

A. I don't understand.

Q. I will withdraw the question.

Q. Have they been teaching Polish in your school since this law passed?

A. Yes, Polish.

Q. Have they been teaching Polish since last spring? Do you understand my question? Have the sisters been using any Polish in that school since the law was passed?

A. Yes, sir.

Q. I don't think you understand me. Have these sisters been using the Polish language, have they talked to the children in Polish since they passed this law?

A. No; they don't talk Polish.

Q. What effect has that had on your children in the lower grades?

A. This time in English they couldn't do nothing.

Q. Why couldn't they do anything?

A. They understand not the English language."

And again from the testimony of Kalamaja (Trans., p. 55):

"Q. Do you know what effect the enforcement of the law had with reference to the pupils in this school, stopping teaching Polish, do you know what effect it had?

A. I know, yes.

Q. What effect did it have?

A. It had the effect that some people were ready to withdraw their children from that school. Moreover, the child of this man that testified here has lost one year's school, almost has learned nothing; simply lost time because no Polish was taught, and the children could not learn, could not profit from the English instruction given.

Q. Is it true in the primary grade?

A. That is true generally."

**ERROR ASSIGNMENTS BELOW.**

The Assignment of Errors, which were passed on by the Supreme Court of Nebraska, appear in the Transcript, pp. 77-80. The specific Assignments relating to the Federal question are as follows:

**III.**

"The District Court erred in deciding and holding that Sections 2, 3, 4 and 5 of Chapter 61 of the Laws of 1921 of Nebraska and each of them are constitutional and not contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, not operating nor calculated to operate to deprive these cross-appellants or either of them of their liberty or property without due process of law, as an unreasonable restraint upon their liberty, or the liberty of either of them, nor as unjustly discriminating." (Transcript, p. 77.)

**XII.**

"Said sections, and each of them, violate Section 4 of the Enabling Act, passed by Congress, April 19, 1864." (Transcrip, p. 78.)

**XIII.**

"Said sections, and each of them, violate the Fourteenth Amendment to the Constitution of the United States." (Transcript, p. 78.)

**XIV.**

"Said sections, and each of them, violate that part of the Fourteenth Amendment to the Constitution of the United States that reads as follows:

'No state shall make or enforce any law which shall abridge the privileges or immunities of the

citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law.' (Transcript, p. 78.)

"5. The trial court erred in holding that the provisions of sections 2, 3, 4 and 5 of the act in question did not violate the provisions of the 14th Amendment to the Constitution of the United States." (Transcript, p. 79.)

"8. It violates the following provisions of Sec. 4 of the Enabling Act, passed by Congress on April 19, 1864:

'And provided further, that said constitution shall provide, by an article forever irrevocable, without the consent of the Congress of the United States \* \* \* Second. That perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship.' " (Transcript, p. 80.)

"9. It violates the following provisions of the Fourteenth Amendment to the Constitution of the United States:

'No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law.' " (Transcript, p. 80.)



**ASSIGNMENT OF ERRORS. .**

The Assignment of Errors in this court appear in Transcript, pp. 91-92, and is as follows:

1. The said Supreme Court erred in holding that Sections 2, 3, 4, 5 of Chapter 61, of the Laws of Nebraska for 1921, and each of them, are constitutional and not contrary to the provisions of Section 1 of the fourteenth amendment to the Constitution of the United States.

2. The said Supreme Court erred in not holding that Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921 were invalid and unconstitutional and in violation of Section 1 of the fourteenth amendment to the constitution of the United States.

3. The said Supreme Court erred in holding that the provisions of Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921 did not operate to deprive these plaintiffs in error of their property without due process of law.

4. The said Supreme Court erred in holding that the provisions of Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921 did not operate to deprive these plaintiffs in error of their property without due process of law.

5. That the said Supreme Court erred in holding that Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921, were not an unreasonable restraint upon the liberty of the plaintiffs in error, and an unjust discrimination against said plaintiffs.

6. That the said Supreme Court erred in holding that the provisions of Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921 did not deny to the plaintiffs in error the equal protection of the law.

7. The said Supreme Court erred in holding that

Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921 were a valid and reasonable exercise of the police power.

8. The said Supreme Court erred in holding sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921 did not validate and contravene the provisions of the Nebraska Enabling Act passed by Congress April 19, 1864. The act among other things provides as follows:

"Section 4. \* \* \* "And provided further, That said constitution shall provide, by an article forever irrevocable, without the consent of the Congress of the United States: \* \* \* Second: That perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship."

9. The said Supreme Court erred in holding that Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921 did not interfere with the mode of public worship of the plaintiffs in error.

10. The said Supreme Court erred in holding that Sections 2, 3, 4, 5 of Chapter 61 of the Laws of Nebraska for 1921 did not interfere with the rights of conscience of plaintiffs in error.

**INTENT AND PURPOSE OF ACT.**

The Act in question seeks:

1. To prohibit the giving of instruction in any subject, in any foreign language, at any time, by any person.
2. To prohibit the study of any subject in any language other than English by any person in any school.
3. To prohibit all children below the ninth grade from studying or using a foreign language in any school.
4. To prohibit parents from hiring tutors to teach their children foreign languages either privately or in schools.
5. To prohibit the study of foreign languages except in the home of the parents and confines the instruction in foreign languages exclusively to the parents of the children taught.
6. To prohibit religious instruction through the medium of a foreign language in private, denominational and parochial schools.

## PRINCIPLES AND AUTHORITIES.

### I.

The Act in question deprives persons of their liberty and property without due process of law.

Gouled vs. United States, 255 U. S. 289.

Truax vs. Raich, 239 U. S. 33; 60 L. ed. 131.

Adams vs. Tanner, 244 U. S. 590, 61 L. ed. 1336.

Algeyer vs. Louisiana, 165 U. S. 568, 41 L. ed. 832.

Brazee vs. Michigan, 241 U. S. 340, 60 L. ed. 1034.

Booth vs. Illinois, 184 U. S. 425, 46 L. ed. 623.

McLean vs. Arkansas, 211 U. S. 539, 53 L. ed. 315.

Ex Parte vs. Arata, 198 P. 814.

Ex Parte vs. Kotta, 200 P. 957.

Hostetter vs. Harris, 197 P. 697.

People vs. Gillson, 109 N. Y. 389.

State vs. Reel Splint, 36 W. Va. 856.

Richie vs. People, 155 Ill. 98.

Bracewall vs. People, 147 Ill. 66.

State vs. Julow, 129 Mo. 172.

Corley's Principles of Cons. Law, 3rd ed. 246.

Columbia Trust Co. vs. Lincoln Institute, 138 Ky.  
804, 129 S. W. 113.

Rorabach vs. Motion Picture, 140 Minn. 481.

### II.

The Act in question is an unreasonable and arbitrary classification.

Truax vs. Corrigan, 66 L. ed. 132.

Yick Wo vs. Hopkins, 118 U. S. 356.

Truax vs. Raich, 239 U. S. 33, 60 L. ed. 131.

Gulf vs. Ellis, 165 U. S. 155, 41 L. ed. 668.

McGoun vs. Illinois, 170 U. S. 283, 42 L. ed. 1037.

Southern vs. Greene, 216 U. S. 400, 54 L. ed. 536.

Barbier vs. Connolly, 113 U. S. 29, 28 L. ed. 923.

Hayes vs. Missouri, 120 U. S. 68, 30 L. ed. 578.

Missouri vs. Lewis, 101 U. S. 22, 25 L. ed. 989.

Lockner vs. New York, 198 U. S. 64, 49 L. ed. 944.

Dobbins vs. Los Angeles, 195 U. S. 240, 49 L. ed. 177.

German Alliance vs. Hall, 219 U. S. 319, 55 L. ed. 236.

Cotting vs. Goddard, 183 U. S. 107, 46 L. ed. 108.

Hudson vs. McCarter, 209 U. S. 349, 52 L. ed. 828.

Noble State Bank vs. Haskell, 218 U. S. 104, 55 L. ed. 112.

Yee Gee vs. San Francisco, 235 Fed. 757.

Davidson vs. Wadsworth, 178 Fed. 776.

Raich vs. Truax, 219 Fed. 276.

In re Marshall, 102 Fed. 326.

Jew Ho vs. Williamson, 103 Fed. 23.

In re Opinion of Justices, 207 Mass. 601, 94 N. E. 558, 34 L. R. A. (N. S.) 604.

City of La Junta vs. Heath, 37 Colo. 375, 88 Pac. 460.

## III.

The Act in question interferes with religious liberty, and therefore abridges the privileges and immunities of citizens of the United States.

Cooley's Principles of Constitutional Law, 3rd Ed. 224.

Cooley's Constitutional Limitations, 7th Ed. 665.

Section 4 of the Enabling Act of Nebraska, passed April 19, 1864.

Section 1 of the 14th Amendment to the Constitution of the United States.

United States vs. Cruikshank, 92 U. S. 542, 23 L. ed. 588.

Paul vs. Virginia, 8 Wall. 168, 19 L. ed. 357.

Ward vs. Maryland, 12 Wall. 418, 20 L. ed. 449.

In re Slaughter Houses Cases, 16 Wall. 36, 21 L. ed. 394.

Arver vs. United States, 245 U. S. 366, 62 L. ed. 349.

United States vs. Wheeler, 254 U. S. 281, 65 L. ed. 270.

Corvell vs. Coryelle, 4 Wash. C. C. 381.

United States vs. Harris, 106 U. S. 629, 27 L. ed. 290.

Hodges vs. United States, 203 U. S. 1, 51 L. ed. 65.

Crandall vs. Nevada, 6 Wall. 35.

Logan vs. United States, 144 U. S. 293.

## IV.

The legislature cannot place unusual and unnecessary restrictions on private business, or impose unusual and unnecessary restrictions upon lawful occupations.

- Lawton vs. Steele, 152 U. S. 137, 38 L. ed. 388.  
 Smith vs. Texas, 233 U. S. 630, 58 L. ed. 1339.  
 Adams vs. Tanner, 244 U. S. 590, 16 L. ed. 1336.  
 Lockner vs. New York, 198 U. S. 45, 49 L. ed. 937.  
 Coppage vs. Kansas, 236 U. S. 1, 59 L. ed. 441.  
 Allgeyer vs. Louisiana, 165 U. S. 578, 41 L. ed. 832.  
 Truax vs. Raich, 239 U. S. 33, 60 L. ed. 131.  
 Booth vs. Illinois, 184 U. S. 425, 47 L. ed. 623.  
 McLean vs. Arkansas, 211 U. S. 539, 53 L. ed. 215.  
 Sparm vs. City of Dallas, 225 S. W. 513, 19 A.  
     L. R. 1387.  
 People vs. Gillson, 109 N. Y. 389.  
 State vs. Goodwill, 33 W. Va. 179.  
 Ex Parte Keeler, 45 S. C. 337.  
 In re Jacobs, 98 N. Y. 98.  
 Ex Parte Whitwell, 98 Cal. 73.  
 State vs. Julow, 129 Mo. 164.

## V.

The legislature does not have power to prohibit competent persons from engaging in a useful and lawful business and to make contracts relating to said business.

- Smith vs. Texas, 233 U. S. 630, 58 L. ed. 1120.  
 Adams vs. Tanner, 244 U. S. 590, 61 L. ed. 1336.  
 Brazee vs. Michigan, 241 U. S. 340, 60 L. ed. 1034.  
 Wiseman vs. Tanner, 221 Fed. 713.  
 Peterson vs. Widule, 157 Wis. 671, 147 N. W. 974.  
 • Lochner vs. New York, 198 U. S. 45, 49 L. ed. 937.

- Adair vs. United States, 208 U. S. 161, 52 L. ed. 436.  
 Coppage vs. Kansas, 236 U. S. 1, 59 L. ed. 441.  
 Allgeyer vs. Louisiana, 165 U. S. 578, 41 L. ed. 832.  
 Truax vs. Raich, 239 U. S. 33, 60 L. ed. 131.  
 Booth vs. Illinois, 184 U. S. 425, 47 L. ed. 623.  
 McLean vs. Arkansas, 211 U. S. 539, 53 L. ed. 215.  
 Lawton vs. Steele, 152 U. S. 133.

## VI.

Parents have control over the education of their children superior to control of state.

- State vs. Ferguson, 95 Neb. 63, 144 N. W. 1039.  
 State vs. School District, 31 Neb. 552, 48 N. W. 393.  
 Nebraska District vs. McKelvie, 104 Neb. 93, 175 N. W. 531.  
 Meyer vs. State, 187 N. W. 101 (dissenting opinion).  
 Nebraska District vs. McKelvie, 187 N. W. 927 (dissenting opinion).



## LIBERTY OF THE PERSON.

The Act in question violates the provisions of the 14th Amendment with reference to the liberty of the person. Liberty does not mean merely the right to be out of jail; it means freedom of religion; freedom to speak, write, study, contract; freedom of intercourse with the family; freedom to pay the expense of maintaining private educational institutions; freedom of control over the family even as against the State.

Of what use is the freedom of speech if the State, under the guise of the police power, can prevent liberty of thought? Of what use is the right to be out of jail if the State can place shackles on the minds of the youth and arbitrarily prevent them from studying a useful subject. The following citations illustrate some of the definitions of liberty:

“The comprehensive word is ‘liberty’; and by this is meant, not merely freedom to move about unrestrained, but such liberty of conduct, choice and action as the law gives and protects.” Cooley’s Principles of Cons. Law, 3rd Ed. 246.

“The word ‘liberty’, as here used, does not mean simple exemption from bodily imprisonment, but liberty and freedom to engage in lawful business, to make lawful contracts therein, to the end of earning a livelihood for self and family, and of acquiring and enjoying property, and of obtaining happiness. The right to contract and be contracted which is indispensable to these indispensable objects. Elsewhere this great right is recognized by the Constitutions by the provision that contracts made in its exercise shall not be impaired. It is a privilege essential to earn bread and secure happiness. Vain would be the pursuit of happiness if

the right of contract necessary to secure the bread of life and raiment and home be taken away. Scarcely any of the great cardinal rights are more universally recognized and vindicated under our system; indeed, under all civilized governments, than this right of contract. A man must have the right to exercise his skill and talents and dispose of and use his labor and property in lawful pursuits as to him shall seem proper. The property right may be violated by prohibiting its full use to the owner as effectually as by taking it from him, his ownership thus being damaged." *State vs. Peel Splint Coal Co.*, 36 W. Va. 856.

"The term 'liberty', as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person or citizen, as by incarceration; but it is deemed to embrace the right of a man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and to work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation. . . . The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression." *People vs. Gillson*, 109 N. Y. 389. See also: *Ritchie vs. People*, 155 Ill. 98; *Bracewell vs. People*, 147 Ill. 66; *State vs. Julow*, 129 Mo. 172.

When the 14th Amendment was under consideration in the United States Senate, Senator Charles Sumner gave expression to the following as his understanding of its application:

"These are no vain words. Within the sphere of

their influence no person can be created, no person can be born with civil or political privileges not equally enjoyed by all his fellow citizens; nor can any institution be established recognizing distinction of birth. Here is the great charter of every human being drawing vital breath upon this soil, whatever may be his condition and whoever may be his parents. He may be poor, weak, humble or black; he may be of Caucasian, Jewish, Indian or Ethiopian race; he may be of French, German, English or Irish extraction; but before the Constitution all these distinctions disappear. He is not poor, weak, humble or black; nor is he Caucasian, Jew, Indian, or Ethiopian; nor is he French, German, English or Irish. He is a Man, the equal of all his fellow men. He is one of the children of the State, which, like an impartial parent, regards all its offsprings with an equal care. To some it may justly allot higher duties according to higher capacities; but it welcomes all to its equal hospitable board. The State, imitating the divine justice, is no respecter of persons."

In the case of *Allgeyer vs. Louisiana*, 165 U. S. 578, 589, Justice Peckham, in discussing the application of the 14th Amendment, said:

"The liberty mentioned in that Amendment means not only the right of the citizen to be free from mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In the recent case of *Gould vs. United States*, 255 U. S.

289, 303, Justice Clark, in discussing the constitutional guaranties of personal liberty, said:

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court in *Boyd vs. United States*, 116 U. S. 616, in *Weeks vs. United States*, 232 U. S. 383, and *Silverthorne Lumber Co. vs. United States*, 251 U. S. 385, have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments (Fourth and Fifth). The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of *habeas corpus* and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well intentioned but mistakenly over-zealous officers."

The Constitution of Nebraska provides for a public school system which shall be free and in which no sectarian instruction shall be given. The State is well within its rights in providing for a system of public education, but the State has neither the power nor the right to create a State monopoly in the matter of education. The right to teach is only another form of the right to express one's ideas. The right to study any subject is a personal right which is protected by the Constitution of the State. If the State has the right to supply a school master, why not

a nurse? If the State has an absolute right to prescribe a mental regime, why not a physical? Why not enact a national bill of fare based on the most approved medical principles? Why not legislate on the color, habitation and corporal exercise of its youthful subjects? The act in question is based on the discarded philosophy of Plato. It is in line with the code of the Spartans, that deprived the parents of any control over the education of their children and vested it exclusively in the State.

This subject of State monopoly in education is not a new one—it is as old as history. It has been the subject of much discussion. Philosophers and statesmen have discussed it for ages. The consensus of civilized thought is in favor of a general supervision by the State, but lodging in the parents the power to control and direct the education of their children. Among those who have expressed opinions on this subject are two of the greatest intellects of the English speaking people.

Herbert Spencer gave his views in the following words:

“If the mental wants of the rising generation ought to be satisfied by the State, why not their physical ones? The reason which is held to establish the right to intellectual food, will equally well establish the right to material food; nay, it will do more, will prove that children should be altogether cared for by the government.”

John Stuart Mill expressed his views on this subject as follows:

“Mere contrivance for molding people to be exactly like one another; and as the mold in which it casts them is that which pleases the predominant power in the government—is in proportion as it is efficient and

successful—it establishes a despotism over the mind, leading by natural tendency to one over the body. An education established and controlled by the State should exist, if it exists at all, as one of the many competing experiments carried on for the purpose of example and stimulus to keep the others up to a certain standard of excellence.”

### ARBITRARY CLASSIFICATION.

The Act in question is an arbitrary and unreasonable classification. It denies to the plaintiffs in error and others similarly situated the equal protection of the law. It denies to that part of the population in Nebraska who speak a foreign language in their homes and use a foreign language as the medium of communication, the right to have their children instructed in a school in the language used in the home. It prevents them from hiring tutors or employing teachers to give religious instruction to their children in the language that is used in the home. It denies to those who happen to use a foreign language as a medium of communication important rights and privileges that are given to those who happen to use the English language.

In *Vick Wo vs. Hopkins*, 118 U. S. 356, 30 L. ed. 220, Justice Mathews, in discussing the effect of an ordinance which discriminated against Chinese residents of California, said:

“The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: ‘Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’ These provisions are universal in their application, to all persons within the territorial juris-

diction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”

\* \* \*

“When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. *But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth ‘may be a government of laws and not of men.’* For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.”

And again:

"The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is therefore illegal, and they must be discharged."

In *Truax vs. Raich*, 239 U. S. 33, 60 L. ed. 131, Justice Hughes, in discussing the question of classification, said (page 41):

"It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union S. H. & L. S. L. Co. vs. Crescent City L. S. L. & S. H. Co.*, 111 U. S. 746, 762, 28 L. ed. 585, 588; *Barbier vs. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924; *Yick Wo vs. Hopkins*, *supra*; *Allgeyer vs. Louisiana*, 165 U. S. 578, 589, 590, 41 L. ed. 832, 835, 836; *Coppage vs. Kansas*, 236 U. S. 1, 14, 59 L. ed. 441. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act



proceeds upon the assumption that 'the employment of aliens, unless restrained, was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—admit or exclude aliens—is vested solely in the Federal government. *Fong Yue Ting vs. United States*, 149 U. S. 698, 713, 37 L. ed. 905, 913. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy is permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be aggregated in such of the states as chose to offer hospitality."

\* \* \* \*

(Page 43): "The restriction now sought to be sustained is such as to suggest no limit to the state's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for, as we have said, it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it

clearly falls under the condemnation of the fundamental law."

In the recent case of *Truax vs. Corrigan*, 66 L. ed. 132, this court held that the classification was unreasonable and arbitrary. Chief Justice Taft, after citing the leading cases on this question of classification and quoting from them at length, says (page 138):

"Thus, the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

And again (page 140):

"Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand. Classification like the one with which we are here dealing is said to be the development of the philosophic thought of the world, and is opening the door to legalized experiment. When fundamental rights are thus attempted to be taken away, however, we may well subject such experiment to attentive judgment. The Constitution was intended—its very purpose was—to *prevent experimentation with the fundamental rights of the individual.*"

In *Hayes vs. Missouri*, 120 U. S. 68, 30 L. ed. 578, the court, speaking through Justice Field, said:

"The 14th amendment does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

In *Barbier vs. Connolly*, 113 U. S. 27, 28 L. ed. 923, Justice Field said:

"Class legislation, discrimination against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the Amendment."

And again:

"Not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that, in the administration of criminal justice, no different or higher punishment

should be imposed upon one than such as is prescribed to all for like offenses."

In *Missouri vs. Lewis*, 101 U. S. 22, 25 L. ed. 989, Justice Bradley, speaking for the court, said:

"The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases, and under like circumstances to resort to them for redress."

Again:

"For, as before said, it (i.e., the equality clause) has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

In *Gulf vs. Ellis*, 165 U. S. 155, 41 L. ed. 668, this court, in discussing the question of classification, said:

"Classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

In *Magoun vs. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, the court said on page 293:

"The rule \* \* \* (i.e., of the equality clause) is not a substitute for municipal law; it only prescribes that that law has the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations."

In *Southern vs. Greene*, 216 U. S. 400, 54 L. ed. 536, this court said:

“While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis.”

**This Act abridges the privileges and immunities of the citizens of the United States.**

In discussing this question, Judge Brannon said in his work on the Fourteenth Amendment, page 65:

“We must first take the plain meaning of the words ‘privileges and immunities.’ Do those words include the thing in question? ‘Privileges’ is affirmative, positive; ‘Immunities,’ negative; the one meaning rights, the other exemption from wrongs. Privileges, in general sense, including both those under state and federal citizenship, are those belonging to the citizen, not merely to a person, and would include, for instance, the right to go and come through all the territory under the jurisdiction of the United States on lawful business or pleasure; \* \* \* \* to seek happiness and pleasure; to worship God, and attend public worship of God and other public assemblages of the people; to entertain what religious opinions conscience dictates, and worship accordingly \* \* \* \* to obtain education in letters, music, art, profession, science, mechanics, or the like; to attend the public schools, no matter by what name known, common, graded or normal schools; academies, colleges or universities; to go to foreign lands; to peaceably assemble and confer upon religion, politics or business; to write and express opinions upon public matters

of business or religion; to petition the government for redress of grievances; freedom of the press."

In *United States vs. Cruikshank*, 92 U. S. 542, 23 L. ed. 588, Justice Waite said on page 554:

"The Fourteenth Amendment prohibits a state from depriving any person of life, liberty or property, without due process of law; but this adds nothing to the rights of one citizen as against another. *It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society.* As was said by Mr. Justice Johnson, in *Bk. vs. Ikely*, 4 Wheat. 244, it secures 'The individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the Amendment."

And again on page 555 said:

"The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty."

In discussing the words "privileges and immunities," mentioned in Article 4, Section 2, of the Constitution, this court said in *Paul vs. Virginia*, 8 Wall. 168, 19 L. ed. 357:

"It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people, as this."

In *Ward vs. Maryland*, 12 Wall. 418, 20 L. ed. 449, this court said on page 430:

"Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of the state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens."

In the *Slaughter House* cases, 16 Wall. 36, 21 L. ed.

394, this court recited the provisions of Articles of Confederation and Article 4, Section 2, of the Constitution and said (page 75):

"There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the Articles of Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

"Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield vs. Coryell*, decided by Mr. Justice Washington in the circuit court for the District of Pennsylvania in 1823, 4 Wash. C. C. 371.

" 'The inquiry,' he says, 'is, what are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; *which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.* What these fundamental principles are, it would be more tedious than difficult to enumerate.' 'They may all, however, be comprehended under the following general heads: Protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.'

"This definition of the privileges and immunities of citizens of the states is adopted in the main by this court in the recent case of *Ward vs. Maryland*, 12 Wall. 430, 20 L. ed. 452, while it declines to undertake an authoritative definition beyond what was necessary to



that decision. The description, when taken to include others not named, but which are of the same general character, *embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental.* Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a state. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the state governments were created to establish and secure."

In *Arver vs. United States*, 245 U. S. 366, 62 L. ed. 349, Justice White in discussing the effect of the 14th amendment said:

"In reviewing the subject we have hitherto considered it as it has been argued from the point of view of the Constitution as it stood prior to the adoption of the 14th Amendment. But, to avoid all misapprehension, we briefly direct attention to that Amendment for the purpose of pointing out, as has been frequently done in the past, how completely it broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore operating, as it does, upon all the powers conferred by the Constitution, leaves no possible support for the contentions made, if their want of merit was otherwise not so clearly made manifest."

In *United States vs. Wheeler*, 254 U. S. 281, 65 L. ed. 270, Chief Justice White says, p. 299:

"Nor is the situation changed by assuming that, as a state has power, by depriving its own citizens of the right to reside peacefully therein and to free ingress thereto and egress therefrom, it may, without violating the prohibitions of article 4 against discrimination,

apply a like rule to citizens of other states, and hence engender, outside of article 4, a Federal right. This must be so, since the proposition assumes that a state could, without violating the fundamental limitations of the Constitution other than those of article 4, paragraph 2, enact legislation incompatible with its existence as a free government, and destructive of the fundamental rights of its citizens; and furthermore, because the premise upon which the proposition rests is state action, and the existence of Federal power to determine the repugnancy of such action to the Constitution—matters which, not being here involved, are not disputed.”

The Enabling Act passed by Congress on April 19, 1864, admitting Nebraska into the Union, required the State, as a condition precedent to admission to the Union, to prepare a constitution and among other things in Section 4 provided:

“That said (state) Constitution shall provide by an article forever irrevocable, WITHOUT THE CONSENT OF THE CONGRESS OF THE UNITED STATES, \* \* \* \* Second, that perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship.”

It is not clear just what effect this provision has. It is clear that Congress had the right to prescribe what should be included in the constitution and if the state did not comply with the suggestion of Congress, it would prevent the state from coming into the Union. What Congress sought to do in the foregoing provision was to require the people of Nebraska to guarantee religious liberty by a provision that could not be changed by the people of Nebraska without the consent of the United States. We have not been able

to find any decision that would be helpful in ascertaining its meaning or effect.

Irrespective of this provision, the right of religious liberty is one of the immunities and privileges that is protected by Section 1 of the 14th Amendment. The Federal Government has the power and the right to forbid a state from interfering with the free exercise of religion. State legislation denying religious liberty is a violation of both the letter and spirit of the 14th Amendment; it is a deprivation of a person's liberty without due process of law; it denies persons the equal protection of the laws; it abridges the privileges and immunities of citizens of the United States.

The 14th Amendment protects the citizen against adverse action by the state of those privileges and immunities that were protected against adverse action by the Federal Government in the first eight amendments of the Constitution of the United States.

In discussing the question of religious liberty, Cooley in his "Principles of Constitutional Law" third edition, page 224, says:

"The Constitution (Federal) as originally adopted declared that 'no religious test shall ever be required as a qualification to any office or public trust under the United States.' By amendment it was further provided that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' Both of these provisions, it will be seen, are limitations upon the powers of Congress only. Neither the original Constitution nor any of the early amendments undertook to protect the religious liberty of the people of the states against the action of their respective state governments. The fourteenth amendment is perhaps BROAD ENOUGH TO GIVE SOME SECURITIES IF THEY SHOULD BE NEEDFUL."

## PROPERTY RIGHTS.

In *Adams vs. Tanner*, 244 U. S. 590, 61 L. ed. 1335, this court held that an act making it lawful for persons to enter into agreement with employment agencies and sought to penalize all persons who maintained or patronized these agencies was a violation of the 14th Amendment and therefore unconstitutional. Justice Reynolds, speaking for the court said:

“Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one’s right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skilfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.

The general principles by which the validity of the challenged measure must be determined have been expressed many times in our former opinion. It will suffice to quote from a few.”

In *Allgeyer vs. Louisiana*, 165 U. S. 578, 41 L. ed. 832, this court held invalid a statute of Louisiana which undertook to prohibit a citizen from contracting outside the state for insurance on his property lying therein, because it violated the liberty guaranteed him by the 14th Amendment.

In discussing this question, Justice Peckham said:

“The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.”

And again on page 592:

“In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in the relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated and sometimes prohibited when the contract or business conflict with the policy of the state as contained in the statutes, yet the power does not and cannot extend to prohibiting the citizens from making contracts of the nature involved in this case outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction; nor can the state legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the state. The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it.”

In *McLean vs. Arkansas*, 211 U. S. 539, 53 L. ed. 315, Justice Day in discussing the power of the legislature to regulate contracts, said:

“It is also true that the police power of the state is not unlimited, and is subject to judicial review; and,

when exerted in an arbitrary or oppressive manner, such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself.

The legislature being familiar with local condition, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

And again:

"If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on a business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail."

In *Booth vs. Illinois*, 184 U. S. 425, 46 L. ed. 623, Justice Harland, in discussing the right of the legislature to regulate and prohibit contracts, said:

"If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

In *Lawton vs. Steele*, 152 U. S. 133, Judge Brown said on page 137:

"The legislature may not under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to supervision of the courts."

In the recent case of *Spann vs. City of Dallas*, 225 S. W. 513, 19 A. L. R., 1387, the court said:

"A law which assumes to be a police regulation, but deprives the citizen of the use of his property under the pretense of preserving the public health, safety, comfort, or welfare, when it is manifest that such is not the real object and purpose of the regulation, will be set aside as a clear and direct invasion of the right of property without any compensating advantages. *Cooley, Const. Lim.* 248."

In *Roraback vs. Motion Picture Machine*, 140 Minn. 481, the right of the owner of a moving picture show to operate a motion picture machine in his own theatre was involved. The labor union insisted that he had no right to work at his own place and because of this the labor union undertook to advertise his show as a place unfair to organized labor. The owner made application for an injunction and the court sustained his right to this injunction. In passing on this question, the court said:

"If men, either singly or in combination, may lawfully injure or destroy the business of another for the purpose of compelling him not to work in such business himself, it will have far-reaching consequences. Such a doctrine would limit the field of business to those who

have sufficient capital to carry on a business without becoming operatives therein themselves, and would debar those who have little or no capital, except their personal skill and ability, from seeking to better their condition by engaging in business on their own account. Such a doctrine means that a machinist who starts a machine shop may lawfully be prevented from working therein as a machinist; that a carpenter who starts a carpenter shop may be required to have all his work done by others; that a barber who opens a barber shop must cease to work as a barber. It means that the man in any occupation who starts in business for himself, relying upon his personal skill and ability to attain success, must forego the right to profit by his own skill, at the arbitrary behest of another, or see his business ruined. Such is not the law. The right of every person to work in his own business is a fundamental right, guaranteed to him by the Bill of Rights in the Constitution and by the 14th Amendment to the Federal Constitution, and any attempt to deprive him of that right is necessarily unlawful. *Truax v. Raich*, 239 U. S. 33, 60 L. Ed. 131 L. R. A. 1916 D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283. However far members of an organization may go in an attempt to force an employer to employ members of the organization, an attempt to force him to desist from working himself, in his own business is clearly an invasion of the right secured by the Constitution." (140 Minn. 481, 168 N. W. 766, 169 N. W. 529, 3 A. L. R. 1290-1293).

In the case of *Columbia Trust Co. v. Lincoln Institute*, 138 Ky. 804, 129 S. W. 113, 29 L. R. A. (N. S.) 53-57, the court said:

"In the case of *Com. v. Fowler*, 96 Ky. 171, 33 L. R. A. 839, 28 S. W. 787, this court said: 'Everyone has the right to follow an innocent calling without permission from the government. He may do with his own whatever he pleases, so that he injure no one else. We



agree with learned counsel that "the doctrine of legislative permission, as a condition precedent to the conduct of any useful or harmless business, is grossly repugnant to those obvious principles of human right which lie at the foundation of just government among men." So, then, without governmental interference or consent, we say the farmer may till his soil, the merchant may buy and sell, the lawyer and the doctor practice their professions, and the druggist and pharmacist compound their medicines.' In the case of *Com. v. Bacon*, 13 Bush, 210, 26 Am. Rep. 189, there was involved the validity of a statute which provided that it should be unlawful for anyone, without the consent of the directors of the Bourbon County Agricultural Society, to open a lot, stable, shed, or other place during the continuance of the society's fairs, for the purpose of receiving, for pay, horses or vehicles of any kind; or for any person or persons to permit the use of his lot, stable, shed or place for any such purposes. Among other things, this court said, in the opinion, holding the act invalid: 'The effect of the act then is to restrict the right of one person to use and enjoy his property in a particular manner, that another may use his in that manner to greater profit than he could if each was left free to use his own as he pleased. In this country, where the right of the citizen to acquire, hold and enjoy property is guaranteed by the fundamental law, it would seem that the statement of the proposition is enough to refute it.' "

## INTERVENOR'S PROPERTY RIGHTS.

The intervenor has contributed to the building of St. Francis school and to its support. He has invested in the neighborhood of \$500 in this school and has paid fifty cents per month for each child that attends. This school is used to assist himself and wife in training and educating his children. He and other people of Polish descent contribute to and maintain this school for the purpose of using the Polish language to educate their children in English and to use said language to instruct their children in religion until they are able to understand English. This school has a course of study substantially equivalent to that of the public schools in the city of Omaha. The children that graduate from this school are the equal in educational qualifications to the children who graduate from the 8th grade in the public schools. These children are raised in Polish homes where no English is spoken. They are so trained that when they leave this school they go into the high school without an examination. An institution that can take a child that lives in a home where only Polish is spoken and can train it in the first eight years in the English language so that it can enter the high school of the city of Omaha without an examination is a useful institution. It is a necessary part of the educational life of this nation. It should be encouraged instead of being discriminated against. The witness Kalamaji testified that if the patrons of this school could not use Polish, there would be no reason for its existence to prevent the use of the Polish language in the school and will destroy its value and impair its usefulness.

### COMMON LANGUAGE.

Section 1 of the act in question requires the study and use of the English language in all schools. This is a sensible regulation well within the police power and one that meets with the hearty approval of all who understand the necessity of learning and understanding the language in general use in our country. This is a constructive and sensible regulation that should have been adopted when our nation began.

Requiring the youth of America to study and use the English language is a useful and sensible regulation, but prohibiting the youth of America from studying and using a foreign language is not only unconstitutional, but it is senseless and silly.

It is inferred that to be a patriotic citizen it is necessary to study and use the English language. The advantages of the use of a common language are apparent. In all recorded time, there never has been a nation that has had an exclusively common language. The great nations that have existed and those now in existence permit the study and use of different languages and with but few exceptions in all history there has never been an effort made to prohibit the study and use of a foreign language, and those instances were where the conqueror imposed his will upon the conquered.

The Republic of Switzerland has maintained its national integrity in war-torn Europe without a common Swiss language. The Swiss people use German, Italian and French. All of these languages are official. There is no doubt regarding the patriotism of the Swiss.

The history of mankind discloses many varieties and

kinds of arbitrary legislation and administration. But, in the intolerant past language prohibition has rarely been enforced. Germany undertook to force Poland to use the German language, and Russia undertook to compel the part of Poland in Russia to use a language other than Polish. These are the two most conspicuous examples of language prohibition that history records. It seems strange that when Germany and Russia, the last survivors of the dangerous doctrine of state absolutism, have practically gone out of business that Nebraska would adopt as part of its laws this most odious, arbitrary and unreasonable exercise of state absolutism.

## **PROHIBITIONS OF SECTION 2.**

The purpose of Section 2 is to prohibit any person from teaching any subject in a foreign language in a school. One of the effects is to prevent any person from receiving instruction in any subject in a foreign language in a school. That is its real intent and purpose.

To prohibit the people of the State of Nebraska from acquiring information and knowledge through the medium of a foreign language in a school is a capricious, unreasonable and arbitrary use of the police power. It deprives the citizen of fundamental rights; it deprives the citizen of his liberty without due process of law; it deprives him of his constitutional immunities and privileges. This section is not a regulation of the use of foreign language. It is an absolute prohibition against the use of foreign language for any purpose in the schools of Nebraska.

This section seeks to close all the avenues of knowledge to the people of Nebraska except such that are open through

the use of the English language. The important contributions made to the knowledge of the world in the languages of Continental Europe cannot be used in Nebraska unless the books and manuscripts in which this knowledge is contained have been translated into the English language.

This act assumes that it is dangerous to the welfare of the state to study poetry in the languages of Virgil, Homer, Dante or Goethe. In order to further the public good, it prevents the study in the original tongue of the novels of Schiller, Balzac, Cervantes and Hugo.

Its purpose is to make the people of Nebraska patriotic, by prohibiting them from studying music in the language of Bach, Beethoven, Handel, Mozart and Wagner; to preserve the public health Nebraskans must not study history in the language of Plutarch, Heroditus or Caesar.

The students of philosophy and theology are denied the right to study in the original tongues, the works of St. Thomas Aquinas, St. Augustine, Luther, Kant and Voltaire.

This act makes it unlawful for the students of science to study the original works of Libnitz, Grotius, Michael Angelo and Gallileo. The lawyers who undertake the study of the original Code Napoleon are subject to prosecution; the student of the drama who would study the original of Moliere is subject to a jail sentence of thirty days.

If the Act in question is valid, the ambitious seekers after truth, who desire to study in a school in the original languages the Divine Comedy of Dante, the Dialogues of Gallileo, or the Philippics of Demosthenes, will be required to engage in this dangerous and hazardous occupation outside the territorial confines of Nebraska.

### PROHIBITIONS OF SECTION 3.

Section 3 of the Act in question provides that languages other than English may be taught as languages only "after a pupil shall have attained and successfully passed the eighth grade, as evidenced by a certificate of graduation issued by the County Superintendent of the County, or the City Superintendent of the City in which the child resides." It is difficult to conceive of a more arbitrary classification than these provisions propose. No one can study a foreign language until he has passed the eighth grade. Even though he has passed the eighth grade, he cannot study a foreign language until he has a certificate issued by the County Superintendent or the City Superintendent. No matter what his attainments might be, nor what his education might be, the only way that a person in Nebraska can study a foreign language is to have a certificate from the proper superintendent stating that he has successfully passed the eighth grade.

The provisions of Section 3 are not directed against the teaching of a foreign language, but attempts to prescribe the place where it should be taught. A foreign language is entirely meritorious and wholesome in the home, and when taught by the parents. The act on its face admits that the teaching of foreign languages is not contrary to good morals or the public good. The study of foreign languages is in harmony with the public weal if done in the home; but it is unlawful if done in any school.

In *Wick Wo vs. Hopkins*, 118 U. S. 356, the operation of a laundry was prohibited in buildings having certain characteristics. The removal of dirt by washing, like the removal of ignorance by teaching, has very generally been

accepted as a thing undeserving of legislative reprobation. If the result is distinctly good, of what consequence is the place where the result is produced? For the worship of God, all space is a temple, and all seasons summer. If the teaching of a foreign language is detrimental to the public welfare, it is equally so whether taught in a school or in the home.

The quality of the act is not controlled by the place where it is done.

Teachers have in the past,—one of them a philosopher, another a God,—been tried, condemned and executed for teaching, but this, so far as history shows, is the first instance in which teaching what is not only innocuous but good, beneficial and wholesome, is made criminal by reason of the place where it is carried on.

### **IS TEACHING FOREIGN LANGUAGE HURTFUL?**

The study of languages is an independent branch of knowledge and has always and everywhere been so considered. With a few exceptions, the study of foreign languages has been encouraged by governments. So, when the Nebraska Bill of Rights declares that "religion, morality and knowledge are essential to good government" and declares it to be "the duty of the legislature to pass suitable laws to encourage schools and the means of instruction," it condemns the inhibition against the teaching of languages, other than English.

The study of languages is the study of history and literary style; it is the means of reproducing the past; it also prepares us to carry on more efficiently in the present

and future diplomatic communication and essential intercourse with all the nations of the earth.

In passing this Act, Nebraska is attempting to give herself an odious pre-eminence among the powers that have in the past enacted freak legislation. If this statute is sustained, it will, in the future, be cited as one of the legal monstrosities. It must be admitted that if the study of a foreign language is not an evil at all, then there is no authority in the police power or elsewhere for the enactment of the law in question. If the study of a foreign language is so dangerous to the public interest that it gives the state authority under its police power to suppress it, then it should be suppressed everywhere. If it is bad to teach foreign languages in schools, it is necessarily bad to teach them in the homes. The attempt to suppress the teaching of foreign languages in schools and to allow them to be taught in the homes is an indefensible classification. The line of demarkation between the classes prescribed by the law is arbitrary and capricious. The effort to prescribe a classification on the place where foreign languages may be studied is illogical, arbitrary and capricious.

In *Meyer vs. State*, 187 N. W. 101, the Supreme Court of Nebraska passed on one phase of language prohibition, and sustained the conviction of a teacher who read Bible stories in German between 1:00 and 1:30 P. M. on school days in a parochial school. The majority opinion seems to be based on the theory that it was proper to exercise the police power to preserve the public health. "Hard cases make bad law."

Under this construction, any subject but foreign languages can be taught outside school hours in a school with-



out injuring the public health, but the teaching of French, Spanish or German has a disastrous effect on the public health. Further discussion along this line leads to the absurd. In the minority opinion Justice Letton announced the correct statement of the law, which is as follows:

"I am unable to agree with the doctrine that the Legislature may arbitrarily, through the exercise of the police power, interfere with the fundamental right of every American parent to control, in a degree not harmful to the state, the education of his child, and to teach it, in association with other children, any science or art, or any language which contributes to a larger life, or to a higher and broader culture.

"Educators agree that the period of early childhood is the time that the ability to speak or understand a foreign, or a classic, language is the most easily acquired. Every parent has the fundamental right, after he has complied with all proper requirements by the state as to education, to give his child such further education in proper subjects as he desires and can afford. As was pointed out in *Nebraska vs. McKelvie*, 187 N. W. 92, the legitimate object of the statute has been accomplished when the basic and fundamental education of every child in the state has been acquired in the English language, instead of in the language of a foreign country.

"The state has the right to manage and control in all particulars schools maintained by taxation; to place other schools under state supervision and to require the same general standards; but it has no right to prevent parents from bestowing upon their children a full measure of education in addition to the state required branches. Has it the right to prevent the study of music, of drawing, of handiwork, in classes or private schools, under the guise of police power? If not, it has no power to prevent the study of French, Spanish, Italian, or any other foreign or classic language, unless

such study interferes with the education in the language of our country, prescribed by the statute."

See dissenting opinion in case of *Nebraska vs. McKelvie*, 187 N. W. 927.

### **AN ACT TO ENCOURAGE IGNORANCE.**

American literature fairly reeks with the assertion, in one form or another, that the palladium of our institutions—the surest safeguard for the protection of our liberties—is education,—liberal education, which, of course, includes the study of languages. The present American life demands not only technical education, but an education which develops the mind, and enables those possessing it to take a broad comprehensive view of the affairs of the state, the nation, and the world. Education should not be confined to the use of any particular language, nor should the place in which education is secured be limited and prescribed.

In the face of this statement, it is strange, indeed, that one of the most enlightened states of this nation passed the act in question which should, with due regard to actual truth, be entitled "An Act to Encourage Ignorance." The title which it bears is more euphemistic, but far less indicative of the scope and purpose of the act. This act narrows liberty,—it narrows it without reason. It has an alien conception and has upon it the suggestion and dank odor of tyranny. The impulse to resist it is spontaneous. Language prohibition has been justified as a more or less effective governmental policy for holding in subjection a conquered people, but that base reason does not exist here. Those affected by this act are our own people. By their

own volition they became a part of us and are content and happy to remain so.

This case must be dealt with in view of historic facts, not pleaded, but clearly within judicial cognizance. This nation was not in its origin, nor during the stages of its growth, an Anglo-Saxon blend, but rather an aggregation of alien peoples having different traditions, ideals, creeds, aspirations and national impulses. The national groups which make up the cosmopolitan people of the United States did not come uninvited. They were asked to come and bring with them all their physical, mental, moral and spiritual endowments—their racial assets and liabilities,—their brain and brawn,—their customs and practices,—their love of freedom,—their conception of freedom; civil and religious,—their language and every other attribute stamped upon them through the centuries since their first out-swarming from continental Europe.

Those from continental Europe were a considerable part of the total population for whose benefit and protection, constitutions were adopted. They had an influential part in the making of those constitutions and they did not, of course, forget themselves and their own national characteristics in making the bedrock laws they were to live under. They were sturdy men, strong in mind and strong of body; they had breadth of vision and thought soundly, and it may be assumed that they would not have assented to, or accepted, the *narrow, shriveled and devitalized definitions of constitutional liberty that would permit the enactment of the act in question.*

## VERBOTEN.

The basic theory of the American government is regulation rather than prohibition. The signs along the highway of our national life direct rather than prohibit. Experience has shown that you cannot make men law-abiding and liberty-loving with penal statutes. The American theory is to make and enforce laws in such a way that the people will love, not fear, the government. We place Verboten signs at places that are dangerous to the individual citizen. We are slow to curtail the liberty of the citizen for the benefit of the state. THE MOST DRASTIC KIND OF PROHIBITION SO FAR PROPOSED IS LANGUAGE PROHIBITION. Its purpose is to prohibit the use and study of a lawful means of communication.

There is serious dissent on the proposition that a majority have a right to prohibit a minority from doing things that relate to the individual's personal relations with himself and his family.

Language prohibition is the most drastic and far reaching step which has been attempted in dealing with the personal rights of the citizen. Outside of the recent cases decided in Iowa and Ohio, there are no adjudicated cases on this class of legislation. Language prohibition seems to be a product of "war psychology." A species of Chauvinistic hysteria. About the time that the nations who used prohibitions laws and Verboten signs to limit and deny the rights of their citizens passed out of existence the most odious form of prohibition appeared in the United States under the guise of language prohibition.

The intervenor Siedlik and his neighbors fled from where state absolutism was a fact and language prohibition

the plan. They came to free America and have become an important part of its life. They have built private schools to assist them in educating their children to be law-abiding, God-fearing, patriotic citizens. The Act in question seeks to prevent these people from studying the language used in their homes.

### **STATE ABSOLUTISM.**

The school of thought that believes that the first concern of Government is the state, proceed on the theory that the state has the power and the right to do anything it deems necessary. In the old days it was said "the king can do no wrong." In these modern days it is said that a majority of the legislature can do no wrong.

It is urged that the will of a transient legislative majority when exercising the police power ought not be questioned by the judiciary.

By a bare majority the legislative branch of government can and does start in motion that undefined, unascertained and limitless agency known as "the police power." Through it the legislative branch seeks to lodge powers in the state. So long as constitutional government exists there must and will be a conflict between the legislative and judicial branches of our government regarding the control that the legislative branch can exercise over our citizens by use of the police power. When the judiciary ceases to stand guard and repel all invasions of the constitutional rights of the citizen, constitutional government is at an end.

One of the lessons that has been taught by the war is that State absolutism is a failure. We have learned that

the Government which accords the largest measure of personal liberty to the citizen is the strongest. Our country has accorded, in the past, more liberty to its citizens than any other nation in the world. In the world war it was demonstrated that the United States was the strongest and most efficient nation in the world.

The United States did its part to overcome by physical force that theory of Government which has for lack of a better name been designated as Prussianism. *Mankind has gained very little in the world war if the Prussian theory of State absolutism has only been temporarily overthrown by physical force. If the Prussian conception of the rights of the State to do whatever those in power deem necessary to be done, without regard to constitutional limit, is still dominant in the world, then the mental conceptions and intellectual activities of the Prussian will continue to influence and direct the world.*

### **POWER OF STATE.**

The right of the State to regulate public schools maintained by taxes is broader than its right to regulate private schools maintained by the funds of those who patronize these schools. The State cannot exercise the same control over private schools that it does over public schools. The State has power to outline a complete course of study in public schools and to prevent the study of any subjects not in that course of study. The State has power to require private schools to maintain a course of study substantially equivalent to that used in the public schools. **THE STATE HAS NO POWER TO PREVENT THE PUPILS IN PRIVATE SCHOOLS FROM STUDYING OPTIONAL STUDIES**

WHICH ARE OUTSIDE AND IN ADDITION TO THE COURSE OF STUDY PRESCRIBED BY THE STATE. For example, the State could prevent the teaching of dancing in public schools. The State has no power to prevent private schools from teaching dancing as an optional study in a private school.

It is suggested that, because the State has a right to pass a compulsory school law, it has complete control over the subject of education and can prescribe what shall not be taught in private institutions. This conception is basically and fundamentally wrong. The individual has rights superior to the State. The individual has rights that the State cannot take away by an exercise of the police power. While the State has the right to pass a compulsory school law, it does not have the right or power to compel every child within its borders to graduate from the high school or attend the State University. The right to prescribe a minimum of education under the police power does not give the State authority to make the children living in the State the wards of the State.

Will it be seriously urged that because the State has the right to pass a pure food law for the purpose of inspecting food, so that there will be nothing poisonous or deleterious sold, that it has entire control of the subject of foods and can prescribe and enforce a bill of fare that every citizen must use? The police power of the State can be exercised in a limited way on many subjects, but it goes without saying that it does not give the State complete control over the subject. As was said by Justice Holmes in the case of *Hudson vs. McCarter*, 209 U. S. 349, 52 L. ed. 828, on page 832:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decision that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property could prevail over public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain."

And as was said in the case of *Noble State Bank vs. Haskell*, 218 U. S. 104, 55 L. ed. 112, on page 117:

"It is asked whether the state could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power as elsewhere in the law, lines are pricked out by the gradual approach and contact of decision on the opposing sides. *Hudson County Water Co. vs. McCarter*, 209 U. S. 349, 52 L. ed. 828, 831, 27 Sup. Ct. Rep. 529, 14 A. & E. Ann. Cas. 560. It will serve as a datum on this side, that, in our opinion, the statute before us is well within the State's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the



line. *Citizens' Loan Asso. vs. Topeka*, 20 Wall. 655, 82 L. ed. 455; *Lowell vs. Boston*, 111 Mass. 454, 15 Am. Rep. 39."

In the instant case, the right to study optional subjects in private schools in addition to the regular curriculum of the public schools is outside of the control of the police power. It is so far outside of that power that there can be no question of the unconstitutionality of any law that attempts to prohibit the study of these optional subjects and the use of these optional subjects in these schools.

In *Nebraska District vs. McKelvie, et al*, 104 Neb. 93, 175 N. W. 531, the court, in passing on a language law, said on page 534:

"Philosophers long ago pointed out that the safety of a democracy, or republic, rests upon the intelligence and virtue of its citizens. 'The safety of the people is the supreme law.' The concept that the state is everything, and the individual merely one of its component parts, is repugnant to the ideals of democracy, individual independence, and liberty expressed in the Declaration of Rights, and afterwards established and carried out in the American Constitution. The state should control the education of its citizens far enough to see that it is given in the language of their country, and to insure that they understand the nature of the government under which they live, and are competent to take part in it. Further than this, education should be left to the fullest freedom of the individual."

And again on page 535 said:

"If the law means that parents can teach a foreign language, or private tutors employed by men of means may do so, but that poorer men may not employ teachers to give such instruction in a class or school, it would

be an invasion of personal liberty, discriminative, and void, there being no reasonable basis of classification; but if such instruction can be given in addition to the regular course, and not so as to interfere with it, then equality and uniformity results, and no one can complain."

If the doctrine announced in the case of *Pohl vs. Ohio*, 102 N. E. 20, is followed, it means that whatever is passed by the legislature is the law. If the courts are bound to presume that the facts before the legislature warranted the exercise of the police power, then there are no constitutional limits on the legislature while exercising that power. The principle announced in the case, if applied, will make our constitutions obsolete and historic documents that will be ornate and pretentious, but not useful. When the courts abdicate their function of declaring laws unconstitutional, our nation will be, as has been wittily said, "merely an economic entity."

### **PARENTS' RIGHTS.**

The parents not only have a right to maintain a private school in which to educate their children in such subjects as they think proper, but they have the right to exercise discretion as to the subjects a child shall study in the public schools. In *State vs. School District*, 31 Neb. 552, this Court said:

"The school trustees of a high school have authority to classify and grade the scholars in the district and cause them to be taught in such departments as they may deem expedient; they may also prescribe the courses of study and text books for the use of the school, and such reasonable rules and regulations as they may think needful. They may also require prompt attend-

ance, respectful deportment and diligence in study. The parent, however, has a right to make a reasonable selection from the prescribed studies for his child to pursue, and this selection must be respected by the trustees, as the right of the parent in that regard is superior to that of the trustees and the teachers."

In discussing this question, Judge Maxwell said in the opinion:

"Now, who is to determine what studies she shall pursue in school; a teacher who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of the child? The father certainly possesses superior opportunities of knowing the physical and mental capabilities of his child. It may be apparent that all the prescribed course of studies is more than the strength of the child can undergo; or he may be desirous, as is frequently the case, that his child, while attending school, should also take lessons in music, painting, etc., from private teachers. This he has a right to do. The right of the parent, therefore, to determine what studies his child should pursue, is paramount to that of the trustees or teacher."

In the recent case of *State vs. Ferguson*, 144 N. W. 1039, this Court followed the doctrine announced in *State vs. School*, *supra*, announced the principle as follows in the third and again in the fourth syllabus:

"The public schools of this State are entitled to the earnest and conscientious support of every citizen. To that end the school authorities should be upheld in their control and regulation of our school system; but their power and authority should not be held to be unlimited. They are required to further the best interests

of their scholars, with a due regard to the natural and legal rights of the parents of such children.

“And when a parent makes a reasonable selection from the course of studies which has been prescribed by the school authorities and requests that his child may be excused from taking the same, the request should be granted. If the request be denied and the child is expelled or suspended for refusal to continue such study, mandamus will lie to compel reinstatement.”

If a parent has a right to use discretion regarding the regular course prescribed in the public schools, it necessarily follows that the parent has more discretion and greater control in a school supported by his private funds.

### CONCLUSION.

This intolerant act grew out of the hatred, national bigotry and racial prejudice engendered by the World War. It should not be sustained as a constitutional exercise of the police power.

Respectfully submitted,

ARTHUR F. MULLEN,  
*Attorney for Plaintiffs in Error.*

Omaha, Nebraska, October 3, 1922.

Number 440.

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IN THE  
SUPREME COURT  
OF THE  
UNITED STATES

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October Term, 1922.

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NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN  
SYNOD OF MISSOURI, OHIO, AND OTHER  
STATES, ET AL., PLAINTIFFS IN ERROR.

V.

SAMUEL R. McKELVIE, CLARENCE A. DAVIS, OTTO F.  
WALTER AND THEIR DEPUTIES, SUBORDINATES  
AND ASSISTANTS, DEFENDANTS IN ERROR.

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**MOTION.**

The above named defendants in error, by their attorney, Clarence A. Davis, Attorney General of the State of Nebraska, respectfully move, under Subdivision 8 of Rule 26, of the Supreme Court of the United States, to consolidate the above entitled case with the case entitled *Robert T. Meyer, Plaintiff in Error, v. The State of Nebraska*, No. 325 (General Number 28823), and for permission to argue the above entitled case with the case of *Meyer v. The State* as a case involving the same question:

CLARENCE A. DAVIS,  
Attorney General of the State of Nebraska,  
*Attorney for Defendants in Error.*

Lincoln, Nebraska,

6, 1922.

Number 440.

---

IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

---

October Term, 1922.

---

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN  
SYNOD OF MISSOURI, OHIO, AND OTHER  
STATES, ET AL., PLAINTIFFS IN ERROR.

V.

SAMUEL R. McKELVIE, CLARENCE A. DAVIS, OTTO F.  
WALTER AND THEIR DEPUTIES, SUBORDINATES  
AND ASSISTANTS, DEFENDANTS IN ERROR.

---

**NOTICE OF SUBMISSION OF MOTION TO CONSOLIDATE  
CASE FOR ARGUMENT.**

You will please take notice that on the annexed statement of facts, verified December 5, 1922, by Mason Wheeler as Assistant Attorney General of the State of Nebraska, and upon the printed record herein, there will be submitted to the Supreme Court of the United States, without oral argument, at a stated term thereof, on Monday, December 18, 1922, at the Capitol, in the City of Washington, in the District of Columbia, a motion of which the foregoing is a copy.

CLARENCE A. DAVIS,  
Attorney General of the State of Nebraska,

*Attorney for Defendants in Error*

Lincoln, Nebraska,

December 6, 1922.

To Arthur F. Mullen, Esq.,

First National Bank Building,

Omaha, Nebraska,

**Attorney for Plaintiffs in Error:**

Service of the above motion with notice thereof is hereby acknowledged this 6th day of December, 1922, and the entry of an order granting leave to argue this case at the same time and with the case of *Meyer v. State*, No. 325, October term, 1922, is hereby consented to.

**ARTHUR F. MULLEN,**

*Attorney for Plaintiffs in Error.*

December 6, 1922.

Number 440.

---

IN THE  
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AND ASSISTANTS, DEFENDANTS IN ERROR.

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**VERIFIED STATEMENT OF FACTS.**

UNITED STATES OF AMERICA, }  
STATE OF NEBRASKA, } ss.  
COUNTY OF LANCASTER, }

Mason Wheeler, being first duly sworn, deposes and says that he is one of the Assistant Attorneys General of the State of Nebraska, and that he has had charge of this case from its inception, and that:

This case involves the validity under the Constitution of the United States of the foreign language law of the State of Nebraska, known as the Norval Act, approved April 14, 1921, and contained in Sections 6457 to 6462, Compiled Statutes of Nebraska, 1922.



The statute prohibits instruction in foreign languages in schools to children who have not passed the eighth grade. The validity of this legislation is attacked in this court on the ground that such legislation is not a legitimate exercise of the police power of the state, that it violates the Fourteenth Amendment to the Constitution of the United States, is an unreasonable and arbitrary classification, deprives persons of their liberty and property without due process of law, and interferes with the exercise of religious liberty. The validity of the statute was sustained by the Supreme Court of the State of Nebraska, and the matter comes before this court by writ of error.

The case of *Robert T. Meyer v. The State of Nebraska*, No. 325, October term, 1922, involves the validity, under the Constitution of the United States, of the foreign language law of the State of Nebraska, known as the Siman Law, Chapter 249 of the Laws of Nebraska of 1919, which statute also prohibits instruction in foreign languages in schools to children who have not passed the eighth grade. In the Meyer case the legislation is also attacked on the ground that it violates the Fourteenth Amendment of the Constitution of the United States, deprives the plaintiff in error of his liberty, abridges his privileges and immunities as a citizen of the United States, and is not a legitimate exercise of the police power.

These two cases involve substantially the same questions and might well be argued together with resultant advantage both to the court and to counsel.

These cases are of considerable public interest to and in the State of Nebraska. In the case at bar, in the district court of the State of Nebraska, an injunction was granted restraining the governor, attorney general and the county attorney from enforcing the statute. Although the holding of the district court was reversed by the Supreme Court of the State of Nebraska, supersedeas bond was allowed by the Chief

Justice of the Supreme Court of the State of Nebraska, and the injunction against the enforcement of the statute continued until the order of the Supreme Court of the United States.

The case of *Meyer v. State*, No. 325, October term, 1922, will be reached on the calendar of this court ahead of this case, and an advanced hearing is desired in both cases, a concurrent motion to advance the Meyer case as a criminal case being submitted with this motion. The record and briefs in both cases have been printed, served and filed and both cases are now ready for argument.

This application for leave to argue this case with the case of *Meyer v. State* is made under subdivision 8 of Rule 26 of the Supreme Court of the United States, which provides:

"Two or more cases involving the same question may by leave of the court be heard together, but they must be argued as one case."

MASON WHEELER.

Subscribed and sworn to before me this 6th day of December, 1922.

[NOTARIAL SEAL]

FRIEDA C. BAYERLEIN,  
*Notary Public in and for Lancaster County, Nebraska.*

Number 440.

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IN THE  
**SUPREME COURT**  
OF THE  
**UNITED STATES**

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October Term, 1922.

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NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN  
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AND ASSISTANTS, DEFENDANTS IN ERROR.

---

**ORDER.**

Upon reading and filing the annexed notice, motion of Defendants in Error, statement of facts verified December 6, 1922, and upon consent of Arthur F. Mullen, Esq., attorney for Plaintiffs in Error, it is hereby ordered that the case entitled *Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio, and Other States, et al., v. Samuel R. McKelvie, et al.*, No. 440, October term, 1922, be consolidated with and argued at the same time as the case of *Robert T. Meyer v. The State of Nebraska*, No. 325, October term, 1922, on the ground that these two cases involve the same legal question.

.....  
*Chief Justice of the Supreme Court  
of the United States.*

Washington, D. C.,

December ....., 1922.

The entry of the foregoing order is hereby consented to.

ARTHUR F. MULLEN,

*Attorney for Plaintiffs in Error.*

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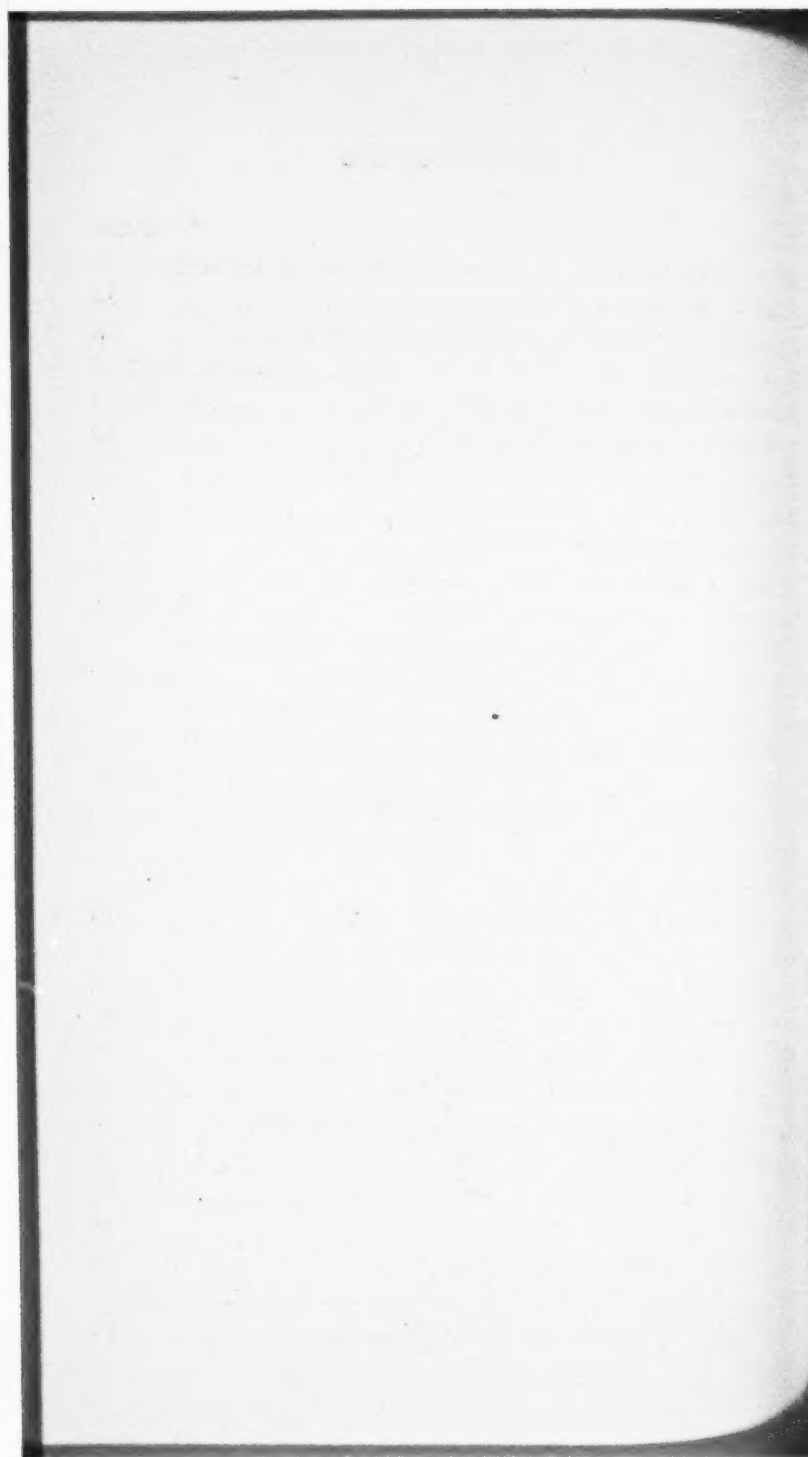
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AND ASSISTANTS, DEFENDANTS IN ERROR.

---

ERROR TO THE SUPREME COURT OF NEBRASKA.

---

**BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.**

---

CLARENCE A. DAVIS, Attorney General  
of the State of Nebraska,  
Lincoln, Nebraska,  
*Attorney for Defendants in Error,*

MASON WHEELER, Assistant Attorney General,  
GUY C. CHAMBERS,  
C. L. DORT, Assistant Attorney General,  
CHARLES S. REED, Assistant Attorney General,  
JACKSON B. CHASE, Assistant Attorney General,  
*Of Counsel.*

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**STATEMENT.**

A judgment of the supreme court of Nebraska sustaining as  
against federal constitutional objections the Nebraska foreign



language legislation enacted April 14, 1921, is questioned in this court by writ of error.

The statute in question, Chapter 61 of the Laws of Nebraska for 1921, found in Sections 6457 to 6462, Compiled Statutes of Nebraska of 1922, and hereinafter referred to as the Norval Act is as follows:

**"ENGLISH, OFFICIAL LANGUAGE.**—The English language is hereby declared to be the official language of this state, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denominational and parochial schools.

**"OTHER LANGUAGES, TEACHING FORBIDDEN.**—No person, individually or as a teacher, shall, in any private, denominational, or parochial or public school, teach any subject to any person in any language other than the English language.

**"SAME, EXCEPTIONS.**—Languages other than the English language may be taught as languages only, after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county or the city superintendent of the city in which the child resides. Provided, that the provisions of this act shall not apply to schools held on Sunday or on some other day of the week which those having the care and custody of the pupils attending same conscientiously observe as the Sabbath, where the object and purpose of such schools is the giving of religious instruction, but shall apply to all other schools and to schools held at all other times. Provided, that nothing in this act shall prohibit any person from teaching his own children in his own home any foreign language.

**"UNLAWFUL TO DISCRIMINATE.**—It shall be unlawful for any organization, whether social, religious or commercial, to prohibit, forbid or discriminate against the use of the English language in any meeting, school or proceeding, and for any officer, director, member or person in authority in any organization to pass, promul-

gate, connive at, publish, enforce or attempt to enforce any such prohibition or discrimination.

**"VIOLATION, PENALTY.**—Any public official, teacher, instructor, or other person who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof be fined in any sum not exceeding one hundred (\$100.00) dollars or less than twenty-five (\$25.00) dollars, or be confined in the county jail for a period not exceeding thirty days for each offense.

**"SECTIONS INDEPENDENT.**—Should the courts declare any portion of this act unconstitutional such decision shall affect only the portion so declared to be unconstitutional and shall not affect any other section or any other part of this act, and it is further provided that each part of this act so far as an inducement for the passage of this act is concerned is independent of every other part.

**"REPEAL.**—Chapter 249, of the Session Laws of Nebraska for 1919, entitled, 'An Act relating to the teaching of foreign languages in the State of Nebraska,' is hereby repealed.

**"EMERGENCY.**—Whereas, an emergency exists this act shall be in force from and after its passage and approval."

Approved April 14, 1921.

It is urged by plaintiffs in error that this legislation deprives them of their property without due process of law, that it unreasonably restrains them of their liberty, that it unjustly discriminates against them, that it denies them equal protection of the law, that it interferes with their right of religious worship and that it is not a reasonable exercise of the police power (Plaintiffs' assignments of error, record pages 91 and 92).

The history of foreign language legislation in Nebraska is interesting. Prior to its repeal in 1918, Nebraska had a statute requiring instruction in foreign languages in grade

schools whenever requested by the parents of fifty pupils of such schools. This statute was sustained by the supreme court of Nebraska in *State ex rel Thayer v. School District*, 99 Neb. 338. After the repeal of this law, which had been invoked to compel instruction in German and on April 9, 1919, the Nebraska Legislature enacted the foreign language law known as the Siman Act (Chapter 249 of the Laws of 1919) which reads as follows:

**"INSTRUCTION IN FOREIGN LANGUAGES PROHIBITED.**—No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any other language than the English language.

**"SAME, EXCEPTION.**—Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

**"VIOLATION, PENALTY.**—Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five (\$25) dollars, nor more than one hundred (\$100) dollars or be confined in the county jail for any period not exceeding thirty days for each offense."

An immediate attack was made in the state courts upon the constitutionality of this law. On December 26, 1919, the Supreme Court of Nebraska, in the case of *Nebraska District of Evangelical Lutheran Synod of Missouri, et al v. McKelvie, the Governor, et al*, reported in 104 Neb. 93, held the Siman law constitutional, dissolved the injunction previously issued against its enforcement, and in its decision construed the statute to permit the teaching of foreign languages to children beneath the eighth grade outside of regular school hours.

Immediately after this decision a Lutheran parochial school in January, 1920, in an attempt to evade the law, by vote of

the board changed the hours of the afternoon session of the school from 1 P. M. to 4 P. M. to 1:30 P. M. to 4 P. M. The time from noon until 1:30 P. M. was specified as a recess. The school however, was convened at 1 P. M. and instruction given in German from 1 P. M. to 1:30 P. M. Of course, if the school hours could be changed to allow a half hour of recess that could be devoted to the teaching of foreign languages to young children the school hours could be so changed as to include a four-hour recess in which instruction in foreign languages could be given to minor children, and the purpose of the statute nullified (*State v. Meyer*, 187 Northwestern 100).

In order to sustain the legislation of 1919 the constitutional convention which met in the winter of 1919-1920 to formulate a new constitution for the State of Nebraska inserted this provision in the bill of rights:

"The English language is hereby declared to be the official language of this state, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denomination and parochial schools" (Section 27, Article I, Constitution of Nebraska, adopted by referendum vote at special election held September 21, 1920).

During the pendency of the appeal to the supreme court of Nebraska from the judgment of the district court in the Meyer case, 187 Northwestern 100, perhaps because the result of the appeal was feared by the legislature then in session, the Siman Act was repealed and replaced by the Norval Act, set forth on pages 2-3 of this brief. From an examination of the latter legislation the intention appears to place beyond the possibility for legal evasion a prohibition against the teaching in schools of foreign languages to children who have not passed the eighth grade. The statute permits the use of foreign languages in Sunday Schools, so as not to interfere with bona fide religion; permits the teaching by a parent of

his own children in his own home; prohibits any organization from discriminating against the use of the English language, declaring that no organization shall in Nebraska promulgate the rule "English Verboten"; provides that foreign languages may be taught to children who have passed the eighth grade examination, and does not prohibit the use of or speech in any foreign language by mature persons.

Notwithstanding the decision of the supreme court of Nebraska upholding the Siman law in *Evangelical Lutheran Synod v. McKelvie*, 104 Neb. 93, and in *State v. Meyer*, 187 Northwestern 100, the Norval law was again attacked on alleged grounds of unconstitutionality, and in fact a district court judge held that the act did not apply to parochial schools (Record p. 19). Upon appeal to the supreme court of Nebraska the district court was reversed and the statute upheld as against all constitutional objections (Record pp. 82 to 86).

It is well to note that Chief Justice Morrissey, one of the two dissenting judges in a court of seven, in allowing the writ of error to this court stayed the mandate of the Supreme Court of Nebraska dissolving the injunction issued by the district court until, the further order of the Supreme Court of the United States (Record p. 95) and continued in force the injunction of the district court restraining the governor, the attorney general and the county attorney of Platte county from enforcing the statute. Although enacted April 14, 1921, this legislation has been so held up by injunction proceedings that as yet it has never had a fair trial.

#### THE PLEADINGS.

Although its correct name is Nebraska District of German Evangelical Lutheran Synod (see certificate of Secretary of State, defendant's Exhibit "B," p. 58 of the record), for the purpose of bringing this action plaintiff dropped its Germanic designation and assumed the name of Nebraska District of Evangelical Lutheran Synod. Not even entering equity with

the proverbial clean hands, but even alleging that it was a law-breaker, that it had in the past and continues to teach German to young children in violation of the Nebraska statute (Par. 5 of petition, p. 4 of the record) plaintiffs depart from their religious field and attempt the secular activity of enjoining the enforcement of the statute on the grounds that said statute is unconstitutional. Plaintiffs claim that at some time they expect to supplant German with English, but assert they themselves will determine the proper time to do so, and decline to do so when the people of the state as represented in the legislature decree they shall (Par. 5 petition, p. 4 of record).

In form the action was one for an injunction restraining the governor, the attorney general and a county attorney from enforcing the statute. The petition alleges that plaintiffs have some \$250,000 invested in educational institutions throughout the state; that in such institutions German has been taught to pupils under the ninth grade; that it is necessary and desirable to impart religious instruction in German; that the enforcement of the foreign language statute would impair the property rights of the plaintiffs, the usefulness and prestige of its schools; would deprive plaintiffs of their liberty and property without due process of law, and that the statute is an unwarranted interference with the exercise of religious liberty and free speech. The Germanic element in Nebraska is represented by the plaintiffs. A few Poles are represented by John Siedlik, the intervenor. Our other citizens of foreign birth, the Scandinavians, Italians and Chinamen, content perhaps to remain plain Americans, are not represented by counsel in this controversy (Petition, record pp. 2 to 13).

The answer of the defendants denies the allegations of the petition that the statute interferes with religious instruction; denies that it impairs the good will and property rights of the plaintiffs' schools; denies that it interferes with liberty and property without due process of law; asserts that plaintiffs

have an adequate remedy at law, and justifies the enactment of the foreign language statute under the police power of the state as desirable for the public welfare and necessary for the public safety.

The answer alleges that a considerable portion of the population of Nebraska is either foreign born or of foreign parentage with a natural tendency toward foreign ideals and ideas of government, and with a natural hesitancy to adopt and assimilate American customs, ideas, methods and form of government; that the continued success of the republican system of government adopted by the United States of America since its inception, is dependent upon a uniformly enlightened American citizenship in full sympathy with the ideals of this nation; that for some time there has been an effort to foster and maintain foreign customs, languages and ideals in some communities and to check the growing Americanization of such communities and to render said communities immune from all influences except those presented by leaders employing a foreign tongue; that the method commonly used has been to preserve and propagate the use of foreign languages in such communities in order that said communities might remain subject to the sole influence of foreign newspapers and foreign leaders; that the method of permanently establishing foreign languages in said communities has been to educate the children of said communities in foreign languages before the child was thoroughly grounded in English; that this insidious foreign propaganda has been extensively carried on under the guise of both education and religion, and by the foreign press; and that in order to remedy this situation, which threatens the safety, peace, good order, well being and social welfare of the state and bids fair to assume the proportion of a social menace, to limit the fields available for foreign propaganda, to insure the percolation of the fundamental principles of Americanization into said communities, that the Nebraska Legislature enacted the statute known as the Norval Act set forth on pages 2-3 of this brief (Answer of defendant, record p. 14 to 16).



## THE EVIDENCE.

At the hearing in the district court, plaintiffs called four witnesses to substantiate the controverted portions of the petition, two of witnesses being Lutheran ministers, the third a Catholic priest and the fourth John Siedlik, a Pole employed in the Omaha stockyards. The ministers testified that the parochial schools were maintained by the church for religious purposes, that in standards and equipment they equalled the public schools; that approximately 10% of the Lutheran parishioners did not understand enough English to participate in religious exercises, and that they thought exclusive use of English in parochial schools might affect their prestige and attendance (Testimony of Rev. Erk, record pp. 24, 30, 31, Qs. 26 to 28, 88, 95-123; Rev. Brommer, record pp. 42, 43, Qs. 248 and 249).

The Reverend Erk testified that as far as his parishioners were concerned that "*In matters of religion the language of their heart is the German language*" (Record p. 25, Q. 35). On cross-examination he testified that the 10% of his parishioners, who did not have sufficient knowledge of the English language to comprehend religious services were the older people; that the church had never made any attempt to teach the older persons English, but had confined their efforts to teaching the young people German (Record pp. 30 and 31, Qs. 94 to 103); that with those who had received their training in the German language, that German was the language of the heart (Record p. 33, Qs. 127 and 128).

Rev. Brommer on cross-examination testified that a number of his parishioners had acquired sufficient knowledge of the English language in business transactions to do business in English, but that they did not understand sufficient English to take part in religious exercises, and admitted that if there was more English used in the church his parishioners could learn religious English just as they had learned business English (Record pp. 43 and 44, Qs. 264 to 268).



John Siedlik testified that his children talked English, but learned Polish from their mother (Record pp. 50 and 51, Qs. 377 to 384). Consequently it was unnecessary for John Siedlik's children to study Polish in the parochial school in order to take part in religious exercises. Siedlik testified that his wife had no trouble in giving religious instruction in Polish to her children in her own home (Record p. 51, Qs. 382 to 384).

The testimony is of little help in the determination of the controverted portions of the petition. The defendants were not permitted to show the situation which the legislature was designed to remedy on the ground that this was a matter to be determined by the legislature (Record pp. 58 and 59).

The testimony falls short of substantiating the allegation of the complaint that the property rights of the plaintiffs would be substantially affected by compliance with the foreign language statute. The reliability of the opinion evidence tendered by plaintiffs' witnesses to the effect that parochial schools afforded the same educational facilities as the public schools (Testimony of Rev. Erk, record p. 24, Qs. 26 to 28) is discredited by the depositions of Lillian Baldrige, Ada Halderman and C. M. Metheny offered by the defendants. These witnesses, one a teacher of long experience, and the other two school officials, after an examination of the parochial schools at Scottsbluff, Bayard and Minatare, Nebraska, testified that plaintiffs' parochial schools were far below the standards of public schools; that their teachers had little training for primary work; that they had insufficient text books; that one teacher supervised seventy pupils in the parochial school while in the public school each teacher was only required to supervise thirty-five; that the parochial schools had no history text books, made no attempt to teach civics or citizenship (Deposition of Lillian Baldrige, record pp. 62-64); that their text books and library facilities were insufficient; the schoolrooms poorly ventilated; the physical and

sanitary conditions bad and that it finally became necessary to close these schools (Deposition of Ada M. Halderman, record pp. 62-65); that their school equipment was antiquated; the school rooms poorly heated and poorly ventilated, books and equipment entirely inadequate, and the parochial schools were so far beneath the standard, that it was necessary to close them (Deposition of C. M. Metheny, record pp. 67-70). Of course the parochial school system is not on trial in this action, but when the plaintiffs' witnesses testify in the face of such evidence that the parochial schools are the equal of public schools the reliability of such witnesses when they testify as to other things such as property damage is quite questionable.

The supreme court of Nebraska passed over the questions raised by defendants as to the jurisdiction of the district court over the governor and the attorney general when they were not served in the jurisdiction; that courts of equity could not be used to enjoin the enforcement of a criminal statute; that the enforcement of an alleged unconstitutionality could only be enjoined when property rights were threatened, and sustained the validity of legislation under the state and federal constitutions as a reasonable exercise of the police power; further holding that the title to the act was sufficient to cover all provisions of the act (Opinion below, record pp. 82 to 87).

### POINTS AND AUTHORITIES.

#### I.

The Nebraska Foreign Language Statute (Norval Law) was a legitimate exercise of the police power of the state.

Decision below of Supreme Court of Nebraska (pp.

82 to 86 of record), in *Nebr. Dist. Evang. Synod v.*

*McKelvie*, (Norval Law case), 187 N. W. 927.

*Nebr. Dist. Evang. Synod, etc. v. McKelvie*, (Siman

Law case), 104 Neb. 93.

*Meyer v. State*, (Neb.) 187 N. W. 100.

Freund on Police Power, Sections 143, 479, 264 to 266.

*Block v. Hirsh*, 256 U. S. 135.

*Pohl v. State*, 102 Ohio State 474.

*Bartels v. State*, 191 Iowa 1060.

*Muller v. Oregon*, 208 U. S. 412.

*Noble State Bank v. Haskell*, 219 U. S. 104, 575.

*Wenham v. State*, 65 Neb. 394.

*C. B. & Q. R. R. Co. v. McGuire*, 219 U. S. 549.

*Halter v. Neb.* 205 U. S. 34.

*McLean v. Arkansas*, 211 U. S. 539.

*Murphy v. Calif.*, 225 U. S. 623.

*Booth v. Illinois*, 184 U. S. 425.

*Wilson v. New*, (Adamson Law case) 243 U. S. 332.

Second Employers Liability Cases, 223 U. S. 1.

*Matter of Gregory*, 219 U. S. 216.

*Rast v. Van Deman*, 240 U. S. 342.

*Pitney v. Wash.*, 240 U. S. 387.

*Arizona Employers Liability Cases*, 250 U. S. 400.

*Gilbert v. Minn.*, 254 U. S. 325.

*Barbier v. Connolly*, 113 U. S. 27.

*Mugler v. Kansas*, 123 U. S. 623.

*Holden v. Hardy*, 169 U. S. 366.

*Jacobson v. Massachusetts*, 197 U. S. 11.

*Atkin v. Kansas*, 191 U. S. 207.

*Sleigh v. Kirkwood*, 237 U. S. 52.

Foreign Language Laws of twenty-one states detailed on pages 25-31 of this brief.

## II.

The Nebraska Statute does not curtail the constitutional guarantee of religious liberty.

*Nebraska Dist. Evangelical Synod v. McKelvie*, 104

Neb. 93 and second case, 187 Northwestern 927.

*State v. Meyer*, 187 Northwestern 100.

*Davis v. Beason*, 133 U. S. 333.

*Matter of Frazee*, 63 Mich. 396.

## III.

The Nebraska Statute is neither unreasonable nor arbitrary classification.

*Evang. Lutheran Synod v. McKelvie*, 187 N. W. 927.

*Halter v. Neb.* 205 U. S. 34.

*Pohl v. State*, 102 Ohio State 474.

*Miller v. Wilson*, 236 U. S. 373.

*C. B. & Q. R. R. Co. v. McGuire*, 219 U. S. 549.

*Lindsley v. Nat. Carbonic Gas Co.*, 220 U. S. 61.

*Johnston v. Kennecott Copper Corp.*, 248 Fed. 407.

*Quong Wong v. Kirkendale*, 223 U. S. 59.

*Lower Vein Coal Co. v. Industrial Board of Ind.*,  
255 U. S. 144.

*Hays v. Mo.*, 120 U. S. 68.

*Mo. v. Lewis*, 101 U. S. 22.

*Mogoun v. Ills. Trust Co.*, 170 U. S. 283.

*Paul v. Virginia*, 8 Wallace 168.

*U. S. v. Wheeler*, 254 U. S. 281.

*Lawton v. Steele*, 152 U. S. 133.

*Erie R. R. v. Williams*, 233 U. S. 685.

*Slaughter House cases*, 16 Wallace 36.

*Tanner v. Little*, 240 U. S. 369.

## IV.

The Nebraska Statute does not violate the constitutional guarantee of personal liberty or private property.

(Cases cited under Point I.)

## V.

The State has the right to regulate courses of study in schools.

*Berea College v. Ky.*, 211 U. S. 45.

*Andrew v. Webber*, 108 Ind. 31.

*State v. Bailey*, 157 Ind. 324, 329.

*Erie R. R. v. Williams*, 233 U. S. 685.

*German Alliance Ins. Co. v. Kansas*, 233 U. S. 389.

*Mobile County v. Kimball*, 102 U. S. 691.

## ARGUMENT.

## I.

The Nebraska Foreign Language Statute (Norval Law) was a legitimate exercise of the police power of the state.

An examination of the statute set forth in full at pages 2-3 of this brief shows that the act forbids the teaching of foreign languages to children of tender years before such children are grounded in the English tongue. The statute does not forbid the use of foreign languages by persons of maturity or prevent the study of foreign languages by persons who had passed the eighth grade. It does not in any way interfere with bona fide religious instruction or with any legitimate religion. It is a regulatory rather than a prohibitory act.

The object of the legislation, as it so clearly pointed out by the Nebraska Supreme Court in *Nebraska District v. McKelvie*, 104 Neb. 93, and in the second case, 187 Northwestern 927, the decision below (Record pp. 45 to 55), and by the Ohio Supreme Court (*Pohl v. Ohio*, 102 Ohio State 497) and by the Iowa Supreme Court (*Bartels v. State*, 191 Iowa 1060), was to create an enlightened American citizenship in sympathy with the principles and ideals of this country, and to prevent children reared in America from being trained and educated in foreign languages and foreign ideals before they had an opportunity to learn the English language and observe American ideals. It is a well known fact that the language first learned by a child remains his mother tongue and the language of his heart. The purpose of the statute is to insure that the English language shall be the mother tongue and the language of the heart of children reared in this county who will eventually become citizens of this country.

The statute is a part of a general Americanization program to bring our citizenry towards the belief that the American government, as outlined by Washington, Lincoln, Webster and Jefferson, is one of, by, and for the people; a government

whose just powers are derived from the consent of the people; a true democracy established in a republic; a sovereign nation of forty-eight sovereign states; a perfect union, one and inseparable, established on principles of freedom, equality, justice and humanity, for the foundation and the continuation of which American patriots have and will sacrifice their lives and imperil their fortunes.

These foreign language statutes are no more difficult to sustain under the Police Power than the Bank Guarantee Act, the Workmen's Compensation Act, the Female Labor Laws and the Tenement House Legislation.

As is shown by the decisions above quoted isolated communities exist in Nebraska where foreign languages are used; which communities are under the control of foreign leaders and cannot be reached by American newspapers, or except through the medium of a foreign tongue; these communities are growing up as little Germanys, little Italys and little Hungarys. In them children are being reared in a foreign atmosphere and in and by foreign languages. As long as these conditions continue such communities cannot well be assimilated into our American Republic. It was to obviate this danger to the state that the Nebraska legislature required that the primary education of Nebraska children should be exclusively in English.

Applying the tests laid down as to the legitimate exercise of the police power by Prof. Freund in his excellent treatise on the Police Power (Section 143):

"Does a danger exist?" "Is it of sufficient magnitude?" Any intelligent observer can see it. The legislature so considered it. The Nebraska Supreme Court called particular attention to it in the decision below, in the two cases of *Evangelical Lutheran Synod v. McKelvie, the Governor et al.*, 104 Neb. 93 and 187 N. W. 927, and in *Meyer v. State*, 187 Northwestern 100.

"Does it concern the public?" The education of the youth, the training for American citizenship, is of vital public concern in a government which depends upon the intelligence of the electorate.

"Does the proposed measure tend to remove it?" The menace of unassimilated social groups differentiated by language will disappear in a generation when all children are first required to master English as their mother tongue. A common language is our greatest assimilator.

"Is the restraint a requirement in proportion to the dangers?" The statute requires only a foundation in English before the study in other languages is attempted. After a child has finished the eighth grade any foreign language may be studied. "English first" is the purpose of the statute.

"Is it possible to secure the object sought without impairing essential rights and principles?" The constitutionality of legislation in respect to hours and wages of railway trainmen was upheld in the Adamson law case, *Wilson v. New*, 243 U. S. 332; regulations in respect to the working hours of women in *Muller v. Oregon*, 208 U. S. 412; compensation for industrial accidents in *Employers Liability Cases*, 223 U. S. 1; *Arizona Employers Liability Cases*, 250 U. S. 400, and legislation regulating rents in municipalities in *Block v. Hirsh*, 256 U. S. 135. If it is within the police power of the state to regulate wages, to legislate respecting housing conditions in crowded cities, to prohibit dark rooms in tenement houses, to compel landlords to place windows in their tenements which will enable their tenants to enjoy the sunshine, it is within the police power of the state to compel every resident of Nebraska to so educate his children that the sunshine of American ideals will permeate the life of the future citizens of this republic. A father has no inalienable constitutional right to rear his children in physical, moral or intellectual gloom. As to all these matters the judgment of the legislature is to be taken as correct unless it appears clearly wrong.



Again in his work on Police Power, Prof. Freund, paragraph 479, says:

"The state has power to control the education of minors and in doing so may further the interests of nationality, but where minors are not concerned, the pursuit of truth and learning must be absolutely free. These principles are so fully recognized by the practice of legislation that they stand unquestioned even if lacking express judicial confirmation."

And in paragraph 274 the same learned author lays down the proposition that the direction of education of children is certainly not beyond the police power. This is true whether education be carried on in private or public schools.

In upholding the Nebraska Law of 1919 the Supreme Court of Nebraska in the Siman law case, *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 104 Neb. 93, 99, said:

"The ultimate object and end of the state in thus assuming control of the education of its people is the upbuilding of an intelligent American citizenship, familiar with the principles and ideals upon which this government was founded, to imbue the alien child with the tradition of our past, to give him knowledge of the lives of Washington, Franklin, Adams, Lincoln and other men who lived in accordance with such ideals, and to teach love for his country, and hatred of dictatorship, whether by autocrats, by the proletariat, or by any man or class of men.

"Philosophers long ago pointed out that the safety of a democracy, or republic, rests upon the intelligence and virtue of its citizens. 'The safety of the people is the supreme law.' \* \* \* The state should control the education of its citizens far enough to see that it is given in the language of their country, and to insure that they understand the nature of the government under which they live, and are competent to take part in it. \* \* \* It has been said by the United States Supreme Court in



*Gundling v. Chicago*, 177 U. S. 183, that the courts will not interfere with the operation of a regulative statute, 'unless the regulations are so utterly unreasonable and extravagant in their nature and purposes that the property and personal rights of the citizens are unnecessarily and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference.' *Giozza v. Tiernan*, 148 U. S. 657.

"Neither the constitution of the state nor the Fourteenth Amendment takes away the power of the state to enact a law that may fairly be said to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order. 'If the state may compel the solvent bank to help pay losses sustained by depositors in insolvent banks, if it may enact workmen's compensation laws in order that the workman shall have no strained relations with his employer, nor become embittered towards society because, though an industry has crippled him, it has paid him nothing, if acts aiming to make better citizens by diminishing the chances of pauperism are sustained, if it is competent for the state to protect the minor from impoverishing himself by contract, it surely is not an arbitrary exercise of the functions of the state to insist' that the fundamental basis of the education of its citizens shall be the knowledge of the language, history and nature of government of the United States, and to prohibit anything which may interfere with such education. Laws, the purpose of which are with respect to foreign language speaking children, to give them such training that they may know and understand their privileges, duties, powers and responsibilities as American citizens, which seek to prevent a foreign language from being used as the medium of instruction in other branches, and as the basis of their education are certainly conducive to the public welfare, and are not obnoxious to any provision of either the state or federal constitution."

In touching upon the need for this legislation the Supreme Court of Nebraska in the decision above quoted, at page 97, said:

"The operation of the selective draft law disclosed a condition in the body politic which theretofore had been appreciated to some extent, but the evil consequences of which had not been fully comprehended. It is a matter of general public information, of which the court is entitled to take judicial knowledge, that it was disclosed that thousands of men born in this country of foreign language speaking parents and educated in schools taught in a foreign language were unable to read, write or speak the language of their country, or understand words of command given in English. *It was also demonstrated that there were local foci of alien enemy sentiment, and that, where such instances occurred, the education given by private or parochial schools in that community was usually found to be that which had been given mainly in a foreign language.*

*"The purpose of the new legislation was to remedy this very apparent need, and by amendment to the school laws make it compulsory that every child in the state should receive its fundamental and primary education in the English language."*

It will be noted that this is not the language of enthusiastic, "Chauvanistic" counsel but is a judicial finding of the highest court of the state of actual conditions as existent in the commonwealth of Nebraska before the passage of this foreign language legislation.

In discussing the purpose of the legislation the Supreme Court of Nebraska (*Meyer v. State*, 187 Northwestern 100) said:

"The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence,

naturally inculcate in them the ideas and sentiments foreign to the best interest of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state."

And in further discussing the present law (the Norval Act of 1921) the Supreme Court of Nebraska in the case of *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 187 Northwestern 927 (Printed record p. 83), said:

"The reasons found by the Legislature for this enactment, we believe are set out in our opinion in *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 104 Neb. 93 and *Meyer v. State*. The legislature intended that the English language should become the universal language of the state; that children of foreign parentage should be so reared and educated that English would come to be their natural language and the language which they would continue to use. Children of foreign parentage, first starting to school, are able to talk the language of their parents. That language is at that time the one naturally favored by them. *The requirement that children who have not passed the eighth grade shall in language study apply themselves exclusively to the English language, so that English shall be mastered and become the more favored one, we are not ready to say is a measure more stringent than is warranted, nor that the Legislature has acted without reason and in a purely arbitrary manner. The law does not create an absolute prohibition against the learning of a foreign language. It only postpones and regulates that teaching. There is no curb on knowledge, such children have a sufficient task to master English in what time and opportunity is available to them for language study. When the child becomes sufficiently versed in English, which in the eyes*

of the law, is when he has passed the eighth grade, and has received the instruction in English which necessarily goes with that extent of education, when that language has become his language, then he is free to study whatsoever language he pleases. The statute was enacted in a jealous regard to further and assure the universal use of English, and as a means to that end, to curtail, so far as could reasonably be done, the rearing of children of foreign parentage in the language of their parents.  
\* \* \*

"It appears to us that the law is a reasonable exercise of the police power and is not unconstitutional as in violation either of the state or of the Federal Constitution. In its operation it does not deprive any person of life, liberty or property without due process of law, nor does it deny the equal protection of the law. It does not interfere with religious liberty nor with the giving of religious instruction."

In sustaining the constitutionality of the Ohio foreign language act, which is substantially the same as that of Nebraska, the Supreme Court of Ohio in *Pohl v. State*, 102 Ohio State 474, said:

"While much consideration in arguments and briefs has been given to the wisdom of the provisions of Sections 7762-1 and 7762-2, General Code, this court is of the opinion that such argument might better be addressed to the legislative branch of the government.

"Courts do not sit to review the wisdom of legislative acts, nor do they possess such power. On the contrary, the policy, the advisability, and the wisdom of all legislation, subject to the veto of the governor and the referendum of the people, are subjects for legislative determination exclusively. The inexpediency, injustice or impropriety of a legislative act are not grounds upon which the court may declare the act void. The remedy for such evils must be sought by an appeal to the justice and patriotism of the legislature itself. Except as limited by the Federal and State Constitutions, the power of the general assembly to legislate is inherent and unlimited and covers the whole range of legitimate legislation.

"If the general assembly in the exercise of its power to legislate enacts laws necessary for the welfare of society, and thereby makes unlawful conduct theretofore lawful, such legislation will not be held to be unconstitutional simply because it forbids the doing of things theretofore permitted. The 'enjoying and defending life and liberty \* \* \* and seeking and obtaining happiness' do not contemplate that they shall be enjoyed, sought and obtained as they were enjoyed, sought and obtained by primitive man, but that they shall be enjoyed, sought and obtained with such regard to the rights of society as the common welfare, as defined by the legislature, requires. It is upon this theory that our system of government exists.

"The legislation in question is of equal application to every pupil of the state who has not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools regardless of nationality, ancestry, or place of birth, and is therefore, of equal operation upon every person within the designated grade.

"The constitutionality of the act under consideration is, therefore, dependent upon whether the common welfare requires such legislation. The legislature is presumed to have had before it such information with reference to the effect of the teaching of the German language to the youth of the state below the eighth grade as justified it in concluding that the common welfare required the prohibition of such teaching to such youth, and if the legislature found such facts to exist as to warrant it in the enactment of the sections in question it is not within the province of a court to redetermine the existence or non-existence of such facts, even though the court might upon such redetermination reach a different conclusion. If under any possible state of facts the sections would be constitutional, this court is bound to presume that such facts exist.

"No principle is better established by the decisions of the federal and state courts than that the possession and enjoyment of all rights are subject to such reasonable regulations as are deemed by the legislative authority to be essential to the welfare of the state, and every intendment is to be made in favor of the validity and law-

fullness of such regulations unless they are clearly unreasonable and violative of some express provision of the constitution.

"For these reasons we are unable to reach the conclusion that Sections 7762-1 and 7762-2 are unconstitutional, and the judgment of the court of appeals will, therefore, be affirmed."

The Supreme Court of Iowa in affirming the conviction of one Bartels who was convicted of the violation of the Iowa foreign language act by teaching reading in German in *State v. Bartels*, 191 Iowa 1060, said:

"The state has a right to adopt a general policy of its own respecting the health, social welfare and education of its citizens, and as long as it does no violation to constitutional inhibitions the citizen within its borders has no other alternative than to obey or remove to a more congenial environment. Iowa has not been backward in enacting legislation under these well recognized powers. Our public health statutes, providing for compulsory quarantine and similar regulations, have been upheld and enforced. A citizen may feel that he has a perfect right to determine for himself whether his child under 16 years of age shall be employed, and the hours and conditions of such service, but, if so, he must acquire residence in some state which has no child labor law similar to ours. So, too, with many other statutes which have been enacted by our General Assembly, and are the settled policy of this state. To all such, the person, native-born or foreigner, who seeks residence within this commonwealth must subscribe. From the earliest days the settled policy of this state has been to foster, encourage and promote the education of its youth. Our great public school system and our state institutions of higher education are the outcome and result of this policy. No one will dispute the power and the right of the state to adopt and carry out such a beneficent policy. \* \* \*

"The policy of the state has been a progressive one, but it has been consistent and in full keeping with its powers to do all these things for the better training and

education of its youth for the full duties and responsibilities of American citizenship. *The advent of the great World War revealed a situation which must have appealed very strongly to the Legislature as justifying the enactment of this statute. Men called to the colors were found to be in some instances not sufficiently familiar with the English language to understand military commands or to read military orders. It was to meet this situation, to encourage the more complete assimilation of all foreigners into our American life, to expedite the full Americanization of all our citizens that the Legislature deemed this statute for the best interests of the state.*

"The manifest design of this language statute is to supplement the compulsory education law by requiring that the branches enumerated to be taught shall be taught in the English language and in no other. \* \* \*

"The policy of the state is apparent, and the evil sought to be remedied is manifest. With the wisdom of the act of the Legislature in passing the statute in question as a means of meeting this situation and seeking to remedy the same we have no concern whatever. That question was wholly for the determination of the General Assembly. They adopted such means as to them seemed wise, appropriate and efficient. \* \* \*

"From an early day it has been the rule of this court that a law will be declared to be unconstitutional only when it is 'clearly, plainly and palpably so.' \* \* \*

"The statute in no manner whatsoever interferes with religious freedom. It is expressly limited to secular subjects. There is scarcely any secular subject taught in our schools that cannot fairly be said to be used in some way in connection with religious instruction or religious belief. It would be going to extreme lengths to say that the regulation of the teaching of such a subject was an interference with religious freedom, because it might be utilized in acquiring religious instruction in some way. Arithmetic, history, writing, geography, all are properly used in religious instruction to some degree. As bearing on this feature of the discussion, see *Owens v. State*, 6 Okla. Cr. 110, 116 Pac. 345, 36 L. R. A. (N. S.) 633, Ann. Cas. 1913B, 1218; *Smith v. People*, 51 Colo.



270, 117 Pac. 612, 36 L. R. A. (N. S.) 158; *Reynolds v. U. S.*, 98 U. S. 145, 25 L. Ed. 244. \* \* \*

"As we have observed, a known evil existed; it was within the power of the Legislature to seek to remedy it by the enactment of this statute. The defendant has a right to engage in the profession of teaching, but in so doing he is subject to such legislative enactments as may be fairly and reasonably said to be for the public welfare. We think this statute was a proper and reasonable exercise of the police power of the state in attempting to prevent an existing evil which the Legislature regarded as inimical to the public welfare. Such being the case, the defendant has not been denied any privileges guaranteed him by the Constitution."

The recognized general necessity for legislation similar to the Nebraska foreign language act, the recognition of the threatened menace and the proper remedy is shown by the fact that twenty-one states besides Nebraska have enacted similar foreign language laws. This language law is not a unique vagary of the Nebraska legislature.

For the convenience of the court, we have incorporated in this brief the legislation of the twenty-one other states:

CALIFORNIA—Section 1664, Political Code:

"All schools must be taught in the English language  
\* \* \*

COLORADO—Section 6010, Chapter, 179 of the 1919 Session Laws (Pg. 599):

"Instruction in the common branches of study in the public elementary schools of this state shall be conducted through the medium of the English language only, nor shall any other than the English language be taught as a separate and distinct branch of itself.

"During the time that the public schools of the district in which he is a resident are in session, no child of school age who has not completed the eighth grade shall be permitted to attend any school where the common branches are not taught in the English language."



DELAWARE—Section 11, Chapter 157, Laws of 1919 (Pg. 356) Rev. Code 2283:

"In every elementary school of and in the state there shall be taught at least reading \* \* \* oral and written English \* \* English shall be the only language employed and taught in the first six grades of the elementary schools of and in the state, provided in case this provision is violated by individuals, private educational associations, corporations, or institutions, the state board of education shall take such legal action as will enjoin such violation."

INDIANA—Section 1, Chapter 18, Laws of 1919 (Pg. 50):

"That all subjects and branches taught in the elementary schools of the state of Indiana, and all elementary schools maintained in connection with benevolent or correctional institutions, shall be taught in the English language only, and the trustee \* \* \* shall have taught in them \* \* \* English grammar, \* \* \* Provided, that the German language shall not be taught in any of the elementary schools of this state \* \* \*."

"All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct pupils who have not completed a course of study equivalent to that prescribed for the first eight grades of the elementary schools of this state, shall be taught in the English language only, \* \* \* Provided, that the German language shall not be taught in any such schools within this state."

KANSAS—Chapter 272, Laws of 1919, amending Section 9415, Gen. Stat. 1915:

"Every parent, guardian, or other person in the state of Kansas having control or charge of any child or children having reached the age of 8 years and under 16 years shall be required to send such child or children to a public school or a private, denominational or parochial school in which all instruction shall be given in the English language only, each school year, for such time as said school is in session."

## Chapter 257, Laws of 1919 (Pg. 352):

"All elementary schools in this state, whether public, private or parochial, shall use the English language exclusively as the medium of instruction."

## LOUISIANA—Section 1, Act 114, Laws of 1918 (Pg. 188):

"It shall be unlawful for any teacher, professor, lecturer, person or persons employed in the public, private, elementary or high schools, colleges, universities, or other institutions, in the state of Louisiana that in any way form part of the public or private educational system or educational work in the state of Louisiana, to teach the German language to any pupils or class."

## Section 1, Act. 177, Laws of 1918 (Pg. 332):

"That any and all persons, firms, partnerships, corporations, and associations or organizations of any and every form and character, all and singular, directly and indirectly, be and are hereby prohibited in this state from \* \* \*; and likewise prohibiting the use or display of any sign, insignia, name, designation, title, phrase, circular, or other form of advertising or description, written, printed, or appearing in the German language or that of any nation allied with Germany, or derived from such language, whether same refers to any article or thing of German origin or not; and likewise prohibiting the sale, exchange, the giving away, distribution, delivering, or in any manner conveying to another or others, or offering or contracting to sell or otherwise dispose of, or to exhibit or display for sale or any other purpose, any book, paper, magazine, or other publication, written or printed or appearing in the German language or the language of any ally of Germany \* \* \*."

## MINNESOTA—Section 1, Chapter 320, Session Laws of 1919 (Pg. 337):

"Every child between eight and sixteen years of age shall attend a public school, or a private school, in each year during the entire time the public schools in the district in which the child resides are in session; provided, however, that no child shall be required to attend

public school more than ten (10) months during any calendar year. In districts maintaining terms of unequal length in different public schools, this requirement shall be satisfied by attendance during the shorter term.

"A school, to satisfy the requirements of compulsory attendance, must be one in which all the common branches are taught in the English language, from textbooks written in the English language and taught by teachers qualified to teach in the English language. A foreign language may be taught when such language is an elective or a prescribed subject of the curriculum, but not to exceed one hour in each day."

MONTANA—Section 912, 1 Revised Codes 1917:

"All schools shall be taught in the English language  
• • •"

NORTH DAKOTA—Chapter 41, Laws of 1918:

"All instruction (in public and private schools) shall be given only and entirely in the English language. It shall be unlawful to teach any subject, except foreign and ancient languages, in any high school, academy, college, or higher institution of learning in this state, or in any private school, academy, college, or institution of higher learning, except foreign and ancient languages and religious subjects, in any but the English language."

OKLAHOMA—Section 1, Chap. 141, Laws of 1919 (Pg. 201):

"That the English language is hereby declared to be the language of the people of the state of Oklahoma. And it shall be unlawful to teach or instruct in any other language in any public, parochial, denominational, or private school or other institution of learning within the state of Oklahoma, except pupils receiving such instruction shall have completed the eight grades of the common school curriculum as designated by the state board of education.

"Sec. 2. All textbooks used in the first eight grades of all said schools shall be printed in the English language. (Penalty, fine, jail.)

**SOUTH CAROLINA**—Section 5, Chap. 135, Session Laws of 1919 (Pg. 206) :

"That any private or parochial school attended by any child between eight and fourteen years of age shall be first approved by the State Board of Education. Such school must give its instruction in the English language, and it must teach such subjects as are required in a similar public school in South Carolina."

**SOUTH DAKOTA**—Section 1, Chap. 41, Laws of 1918:

"Every person having under his control a child of the age of 8 years and not exceeding the age of 16 years shall annually cause such child to regularly attend some public school, or private day school, for the entire annual term in each year during which the public school in the district in which such person resides is in session, until such child shall have completed the first eight grades of the regular common school course; \* \* \* Provided, further, that all such instruction shall be given only and entirely in the English language."

**OHIO**—1919 session of the legislature passed the following act:

"Sec. 7762-1. That all subjects and branches taught in the elementary schools of the state of Ohio below the eighth grade shall be taught in the English language only. The board of education, trustees, directors and such other officers as may be in control, shall cause to be taught in the elementary schools all branches named in Section 7648 of the General Code. Provided, that the German language shall not be taught below the eighth grade in any of the elementary schools of this state.

"Sec. 7762-2. All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct pupils who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of this state, shall be taught in the English language only, and the person or persons, trus-

tees or officers in control shall cause to be taught in them such branches of learning as prescribed in Section 7648 of the General Code or such as the advancement of pupils may require, and the persons or officers in control direct provided that the German language shall not be taught below the eighth grade in any such schools within this state."

"Sec. 7762-3. Any person or persons violating the provisions of this act shall be guilty of a misdemeanor and shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each separate day in which such act shall be violated shall constitute a separate offense.

"Sec. 7762-4. In case any section or sections of this act shall be held to be unconstitutional by the Supreme Court of Ohio such decision shall not affect the validity of the remaining section."

**IOWA—Section 2263, Compiled Code of Iowa:**

"The medium of instruction in all secular subjects taught in all of the schools, public and private, within the state of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited; provided, however, that nothing herein shall prohibit the teaching and studying of foreign languages as such as a part of the regular school course in any such school, in all courses above the eighth grade."

**WASHINGTON—Section 4889 of the 1919 General Statutes:**

"All common schools shall be taught in the English language \* \* \*."

Other states having similar laws are:

**IDAHO—Page 492 of the 1919 Session Laws.**

**ILLINOIS—Page 917, 1919 Session Laws.**

**MASSACHUSETTS—Page 478, Revised Laws of 1902.**

**NEVADA—Page 247, 1919 Session Laws.**

OREGON—Page 34, 1919 Session Laws.

WEST VIRGINIA—Chapter 2, 1919 Session Laws.

In no state has this foreign language legislation been successfully attacked. Except in three states it has been generally accepted. In three states only, Ohio, Iowa and Nebraska, have attempts been made to overthrow it. In every adjudicated case such legislation has been sustained and upheld as against all constitutional objections that astute counsel could formulate.

The Nebraska legislation does not prohibit speaking or writing in foreign languages. There is nothing in it to prohibit the publication of a German newspaper; nothing which would interfere with the legitimate activities of the "Lieder Kranz" or the "Turn Verein." The purpose of the statute is only to insure instruction in English to children before instruction in foreign languages.

The danger to the American Republic from isolated communities using foreign languages and thus rendering themselves immune from the influences of the "Melting Pot" is pointed out by John W. Weeks, Secretary of War in the present cabinet,—the officer specifically charged with the defense of the realm and who from the opportunities of his position is well qualified to speak on the subject. In an article in the August 12, 1921, edition of the American Legion Weekly on page 4 the Secretary states:

*"Ignorance of the English language, of American ideals and the history of our country and its form of government, is America's most powerful enemy."*

The population of Nebraska as shown by the 1910 census was 1,182,214. Nearly one-half of our population, 539,014, are either foreign born or born of one or more foreign parents, 176,662 being foreign born and 362,352 being of foreign parentage. The illiterates of ten years and over number 18,009. The illiterates of native parentage number 2,787, and those of

foreign born or mixed parentage total 13,755 (these figures are taken from the World Almanac, 1921 Edition) . Secretary of War Weeks in the article previously referred to states that 24.09 per cent of the men examined for the draft army were unable to read American newspapers or to read an English letter. A moment's reflection on these figures impresses anyone with the menace to the state that exists from the presence in our midst of such a large number of persons who cannot read or write English and are immune to Americanization influences. We all realized it during the war. Our government is based upon the intelligence of the electorate and cannot successfully exist with an ignorant population. All this was keenly appreciated by the Nebraska legislature, and with this situation in mind the legislation was enacted.

In their comparison on page 47 of plaintiffs' brief between the Nebraska legislation and the attempt of Germany to force Poland to use the German language, and the attempt of Russia to forbid the use of Polish in Russian Poland, plaintiffs' counsel fail to appreciate the difference between requiring those who seek asylum in America to use the language of the country and between attempting to impose by force of arms a foreign language upon a conquered people in their own country. Of course, the latter is tyrannical, just as the former is merely self-protection.

The following principles and their application in respect to the police power may be gleaned from recent decisions of the Supreme Court of the United States. It will be noted that the latter decisions extend the police power to many occupations and situations to which the earlier decisions did not.

The police power itself is an attribute of sovereignty. It exists without any reservation in the Constitution. It is founded on the right of the state to protect its citizens, to provide for their welfare and progress and to insure the good



order of society. It corresponds to the right of self preservation in the individual. Its application varies with the exigencies of the situation and with the progress of mankind. It is the foundation of our social system. Upon it depends the security of social order, the life and health of the citizen, the comfort of existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. It extends to the protection of life, health, comfort and welfare of persons and also to property, and to the welfare of the state itself. All natural persons within the jurisdiction hold their property and pursue their various callings subject to the police power. It is inherent in the various states of the Union, as well as in the Federal government. To the extent that property or business is devoted to public use or is affected with a public interest it is governed by the police power. It extends to regulation of education as the very existence of our government, as well as its progress and development, depends upon the intelligence of our citizenry.

In the case of *McLean v. Arkansas*, 211 U. S. 539, the Supreme Court of the United States, in upholding a statute of Arkansas providing that in coal mines the miners' output must be weighed before it was screened as against the objection that it was not a proper exercise of the police power, that it was an abridgement of the freedom of contract, and that it was an unjust discrimination against persons engaged in the mining industry, the court said:

"But in many cases in this court the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the state, enacted for the protection of the public health, safety or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract.

"It is then the established doctrine of this court that liberty of contract is not universal, and is subject to



restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health and welfare of the people. \* \* \*

"The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. *Jacobson v. Massachusetts*, 197 U. S. 11; *Mugler v. Kansas*, 123 U. S. 623; *Minnesota v. Barber*, 136 U. S. 313, 320; *Atkin v. Kansas*, 191 U. S. 207."

In *Sligh v. Kirkwood*, 237 U. S. 52, this court held that as the raising and marketing of citrus fruit is one of the principle industries of Florida, that special legislation relating to the export of low grade fruit should be upheld as within the police power as such legislation was desirable for the public welfare to protect the reputation of the state in the fruit trade. In this case the court promulgates a broad definition of the police power, as follows:

"The police power in its broadest sense, includes all legislation and almost every function of civil government. *Barbier v. Connolly*, 113 U. S. 27. It is not subject to definite limitations, but is co-extensive with the necessities of the case and the safeguards of public interest. *Camfield v. United States*, 167 U. S. 518, 524. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. *Chicago etc. Ry. v. Drainage Commissioners*, 200 U. S. 561, 592. In one of the latest utterances of this court upon the subject it was said: 'Whether it is a valid exercise of the police power is a question in the case, and that power we have defined as far as it is capable of being defined by general words a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals and safety,

but to those which promote the public convenience or the general prosperity' \* \* \* And further, 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of the government.' *Euband v. Richmond*, 226 U. S. 137."

In *Muller v. Oregon*, 208 U. S. 412, a noteworthy case in which Justice Brandeis was counsel, a statute of Oregon limiting the hours of labor of female employees in certain industries was upheld as within the Fourteenth Amendment to the Constitution of the United States, on the ground that the physical structure and maternal functions of woman placed her at an industrial disadvantage. As healthy mothers were deemed essential to the production of vigorous offspring, the physical well-being of women became an object of public interest and care. In order to preserve the strength and vigor of the race her hours of labor could be limited by the legislature. It was within the province of the state to protect her from the greed of an employer as well as from promiscuous lust.

In *Holden v. Hardy*, 169 U. S. 366, an eight-hour labor law applying to the mining industry was held constitutional. In *Jacobson v. Massachusetts*, 197 U. S. 11, a law requiring vaccination against smallpox was upheld. In *Atkin v. Kansas*, 191 U. S. 207, a statute of Kansas prescribing the maximum day of labor at eight hours for those employed on public works, was upheld.

In *Murphy v. California*, 225 U. S. 623, this court upheld as within the police power an ordinance of a California municipality which prohibited the maintenance of billiard rooms within municipal limits except in connection with hotels. It was said that the Fourteenth Amendment to the Federal Constitution was never intended to protect billiard-hall proprietors in their occupation as against the exercise of the police power of the city, the court saying:

"The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but does not prevent legislation intended to regulate useful occupa-

tions, which because of their nature and location, may prove injurious or offensive to the public."

The court in short order and with a mere statement that there was no merit therein disposed of the contention that the ordinance amounted to a denial of equal protection of the law because it permitted hotels to retain billiard tables.

In *Booth v. Illinois*, 184 U. S. 425, an Illinois statute against dealing in grain futures was upheld on the theory that courts had nothing to do with the policy of legislation. The rule as to the protection provided by the Fourteenth Amendment to the Federal Constitution was stated as follows:

"If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law. *Mugler v. Kansas*, 123 U. S. 623; *Minnesota v. Barber*, 136 U. S. 313, 320; *Brimmer v. Rebman*, 138 U. S. 78; *Voight v. Wright*, 141 U. S. 62."

In the *Second Employers' Liability Cases*, 223 U. S. 1, this court held that congress, by virtue of its constitutional power to regulate interstate commerce, could enact a transportation employees' liability act providing compensation to all injured in the course of employment without regard to the negligence of the employer or a fellow servant and thus could change existing rules regarding liability for injuries and freedom of contract, and could thus supersede existing state legislation on these subjects.

In *Noble State Bank v. Haskell*, 219 U. S. 104, in upholding the constitutionality of a state bank guaranty law, the

court said in respect to the alleged conflict between the police power and the guaranty act:

"In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power.

"The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up (see *Receiver of Danby v. State Treasurer*, 3 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark v. Nash*, 198 U. S. 361; *Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, 531; *Offield v. New York, New Haven & Hartford R. R. Co.*, 203 U. S. 372; *Bacon v. Walker*, 204 U. S. 311, 315.

"It may be said in a general way that the police power extends to all the great public needs. *Canfield v. United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be great-

ly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of these conditions at the present time is the possibility of payment of checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it.

"The question that we have decided is not much helped by the propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the States may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above described co-operation are necessary safeguards, this court certainly cannot say that it is wrong. *North Dakota v. Woodmanse*, 1 N. Dak. 246; *Brady v. Mattern*, 125 Iowa 158; *Weed v. Bergh*, 141 Wis. 569; *Commonwealth v. Vrooman*, 164 Pa. 306; *Myers v. Irwin*, 2 S. & R. 368; *Myers v. Manhattan Bank*, 20 Ohio 283, 302; *Attorney General v. Utica Insurance Co.*, 2 Johns. Ch. 371, 377."

In denying a motion for a rehearing in *Noble State Bank v. Haskell*, 219 U. S. 575, the court said:

"We fully understand the practical importance of the question and a very powerful argument that can be made

against the wisdom of the legislature, *but on that point we have nothing to say as it is not our concern.*"

In *Arizona Employers' Liability Cases*, 250 U. S. 400, this court upheld the Arizona employers' liability law as a police regulation as against the constitutional objections that it contravened the Fourteenth Amendment, deprived an employer of his property without due process of law, denied him equal protection of the law and interfered with the workman's constitutional rights of life, liberty and property.

In *Gilbert v. Minnesota*, 254 U. S. 325, this court upheld a statute of the state of Minnesota making it a misdemeanor to discourage military service by public speech, as within the police power of the state and as not transgressing the constitutional liberty of free speech, and in respect to the argument that defendant had a constitutional right to freedom of speech, said that it would be a travesty on the constitutional privilege he invokes to assign him its protection under the circumstances of this case.

In the Adamson law cases, *Wilson v. New*, 243 U. S. 332, the constitutionality of the Adamson Law fixing eight hours as a standard day for railway trainmen for the basis of pay, except on electric roads and on roads less than one hundred miles long, was upheld by this court as against the objections that:

(1) Congress had no power to legislate as to wages in transportation industries.

(2) That there was illegal discrimination in exempting roads operated by electricity, and short line railroads from the provisions of the act.

(3) That the eight-hour day regulation as a basis of pay was arbitrary.

The court held that the legislation was reasonable and desirable in the face of the emergency presented by the threat of a general strike.

Certainly, if the hours of labor in the mining industry can be regulated; if congress may fix an eight-hour day as a basis of pay in transportation industries; if it can compel solvent banks to pay the losses occasioned by the operation of insolvent banks; if it can forbid the keeping of billiard tables within the municipal limits; if it can compel universal vaccination against smallpox; if it can legislate concerning the hours a man or woman is permitted to work, if the marketing of citrus fruits is of sufficient importance to the state of Florida to merit and sustain special police power legislation to aid the industry, then surely the police power is ample to permit a state to so regulate the education of its children that they may speak the language of the country and that the citizenry of the state may be therefore improved. The Legislature of Nebraska should not be handicapped in its reasonable effort to prohibit a menace not only to the public welfare but to the safety of the state itself.

In the recent case of *Block v. Hirsh*, 256 U. S. 135, a rent law giving the tenant the right to occupy any hotel, apartment, or rental property, notwithstanding the expiration of his lease, so long as he paid the rent originally prescribed in the lease, was upheld by this court in the following language:

"These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if, to answer one need, the legislature may limit height, to another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature, but they certainly are not less pressing. Congress has stated the unquestionable embarrassment of government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present."



## II.

The Nebraska Statute does not curtail the constitutional guarantee of religious liberty.

Plaintiffs in their assignments of error (Record pp. 91 and 92) assert that the Nebraska statute interfered with the mode of public worship of the plaintiffs (Assignment 9); that it interfered with plaintiffs' right of conscience (Assignment 10), and that it contravened the provisions of the Nebraska Enabling Act passed by Congress April 19, 1864, specifying the conditions upon which Nebraska was admitted to statehood:

Section 4 of said Enabling Act, reads as follows:

"\* \* \* And provided further, that said constitution shall provide by an article forever irrevocable, without the consent of the Congress of the United States. \* \* \* Second: That perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship."

Nebraska has complied with the conditions of this Act admitting her to statehood by the enactment of Section 4, Article I of the Constitution of Nebraska, reading as follows:

"All persons have a natural and indefeasible right to worship Almighty God, according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morals and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."



It is submitted that no portion of the Nebraska statute interferes with bona fide religious exercises. It does not prohibit the use of foreign languages in religious services. It neither prevents the employment of Latin by the Catholics in the cathedral nor of Hebrew by the Jews in the synagogue. "The so-called ancient or dead languages, not being, strictly speaking, foreign languages, obviously do not come within the spirit or the purpose of the act" (Opinion of Supreme Court of Nebraska in *Nebr. Dist. Evan. Lutheran Synod v. McKelvie*, p. 83 of printed record, 187 Northwestern 927). The question is a political rather than a religious one. Plaintiffs' effort is to establish a field for foreign political propaganda rather than for religious work.

As appears from the historical anecdote recited by Wells in his *Outlines of History*, page 919:

"One of the most popular songs in Germany during the period following the closing of the Napolonic wars declared that the German Fatherland existed wherever the German tongue was spoken."

Mr. Wells speaking from the viewpoint of a historian declares:

"It is extraordinarily inconvenient to administer together the affairs of people speaking different languages and so reading different literatures, and having different general ideas. Only some strong mutual interest, such as the common defensive needs of the Swiss mountaineers can justify a close linking of people of dissimilar languages." (*Wells Outlines of History*, p. 917).

The Constitution of the United States (first amendment) provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; \* \* \*"

It will be noted that the federal constitution only contains a limitation on the powers of Congress.

It will be noted that section 3 of the Nebraska statute specifically permits the use of foreign languages in the giving of religious instruction on Sunday. An attempt is made to justify the employment of foreign languages on the ground that their use is necessary in plaintiffs' religion. In this argument the plaintiffs fail to distinguish between religion and mere forms of worship.

The early settlers, who came to America seeking religious liberty did not come for the purpose of worshiping God in a tongue foreign to the land to or from which they migrated. The religious liberty sought by our forefathers, the boon for which they endured the hardships and perils incident to the settlement of a new continent was the right to worship according to the dictates of their own consciences. It was the preservation of this right of freedom of conscience, which our national and state constitutions have guaranteed. There is no guarantee of an inalienable right to use any language one chooses and no granting of a right to perpetuate alien ideals under the guise of religion.

Religion may be defined as a belief in an invisible, super-human power, a system of faith, doctrine and worship; a loving obedience and service to God as a Heavenly Father and to our fellowmen.

Religion is not a matter of language or geography, but only of individual belief. It matters little whether the Sermon on the Mount was written in Greek or Latin; the beauty of its doctrine remains the same independent of language and independent of the mode of expression. The wisdom expressed in the Proverbs of Solomon is not affected by the fact that they were written in the ancient Hebrew. They are just as efficacious when translated into English, German or French. The Ten Commandments are excellent rules of conduct whether given in Greek or Latin. Who knows or cares whether "Theses" of Martin Luther, affixed to the church at Wittenberg were composed in German or Latin. It will always exist as an immortal document.

The only religion that requires a special language for its doctrines is the "Me und Gott" doctrine once promulgated by the Hohenzollerns.

The point is that the plaintiffs in their endeavor to foist the German language upon immature children have attempted to do so under the pretext of religious teaching, when their main purpose has been to promote the German language rather than religious precepts. The German language is no more a necessary part of plaintiffs' Evangelical Lutheran religion than was polygamy a necessary doctrine of the Mormon Church. There is no question that the state has a right, under its police power, to curb licentiousness existing as a doctrine of polygamy under the rules of the Mormon Church, and there is no question but that the state has the right to prohibit the ingrafting of German ideals upon young American children through the guise of religious instruction.

Religion, as well as art and science, remains the same whether discussed in French or English. It is immaterial whether we term the Supreme Being "Jehovah," "God," or "Allah." We can worship him just the same under any name.

We confess we are unable to appreciate "Deutschland Ueber Alles" when translated into any other language, but we lose nothing from Goethe's "Faust" or Hugo's "Les Misérables" when translated into English. The beautiful supplication commencing "Our Father Who Art in Heaven" is as efficacious when rendered by a suppliant in Nebraska in the form of the Lord's Prayer as when rendered by a worshipper at St. Peter's in the form of the Paternoster. Religion is a matter of faith, not of language. We venture to assert that every doctrine of plaintiffs' church can be expressed as well in English as in German. Plaintiffs would be advancing the great work of Americanization if they would use English as their method of expression and instruction, and so educate their parishioners rather than attempt

to block the Americanization program by adherence to foreign tongues.

Plaintiffs' witnesses testified that about 10% of their parishioners, the older element, did not understand sufficient English to enable them to participate in religious services conducted in English. They now urge the necessity of teaching the 90% German so that church services may be conducted in that language. If plaintiffs are permitted to follow this policy, the use of German will be perpetuated and they never will learn English. The statute does not prohibit the teaching of German to persons of mature years. Its function is to prevent a child before he reaches the age of choice or discretion being inoculated with German. The testimony is that even the 10% who cannot appreciate religious English have sufficient knowledge of business English to handle their own affairs (Testimony of Reverend Erk, record pp. 32, 33; Reverend Brommer, record pp. 43-45). If more English were used in the church this difficulty would not exist. Plaintiffs' parishioners can learn religious English just as they have mastered business English. What is needed is more English in the church rather than more German in the schools.

That the religious element is needlessly injected into this litigation is pointed out by the Nebraska Supreme Court decision in *State v. Meyer*, 187 Northwestern 100:

"A thorough knowledge of the German language as would be gained by young children by a course of study in the schools would no doubt, as pointed out in the testimony, make more convenient the matter of religious worship with their parents, whose knowledge of English was limited; but is such a reason sufficient to override the salutary effect and purpose of the statute? If a foreign language can be taught to children of tender years, for the purpose of allowing them to worship in that language, under the guise that such instruction is religious teaching, then the statute is a nullity. Writing, reading, geography and a variety of other subjects could as well be called religious subjects whenever the purpose

was declared to be to use the knowledge, thus attained, as an aid in religious worship.

"Though the statute prohibits the study of the German language and may, to an extent, limit the younger children from as freely engaging in religious services conducted in the German language, as otherwise might be the case, we cannot say that such restriction is unwarranted. The law in no way attempts to restrict religious teachings, nor to mold beliefs, nor interfere with the entire freedom of religious worship.

"Whenever the actions of individuals, even though in pursuance of religious beliefs—in this case the teaching in the schools of the German language to children of tender years—are considered as not in harmony with the public welfare, then it is proper that those acts be curbed.

"As said by Chief Justice Campbell in *In re Frazee*, 63 Mich. 396, 405: 'We cannot accede to the suggestion that religious liberty includes the right to introduce and carry out every scheme or purpose which persons see fit to claim as part of their religious system. There is no legal authority to constrain belief, but no one can lawfully stretch his own liberty of action so as to interfere with that of his neighbors, or violate peace and good order. The whole criminal law might be practically superseded if, under pretext of liberty of conscience, the commission of crime is made a religious dogma. It is a fundamental condition of all liberty, and necessary to civil society, that all men must exercise their rights in harmony, and must yield to such restrictions as are necessary to produce that result.'

"Though every individual is at liberty to adopt and follow with entire freedom whatsoever religious beliefs appeal to him, that does not mean that he will be protected in every act which he does which is consistent with those beliefs, for when his acts either disturb the public peace, or corrupt the public morals, or otherwise become inimical to the public welfare of the state, the law may prohibit them, though they are done in pursuance of and in conformity with the religious scruples of the offending individual. 12 C. J. 944, Sec. 453, *McDowell v. Board of Education*, 172 N. Y. Supp. 590; *State v. Neitzel*, 69 Wash. 567, 43 L. R. A. (N. S.) 203; *Reynolds v. United*

*States*, 98 U. S. 145; *People v. Ashley*, 172 N. Y. Supp. 282; *Smith v. People*, 51 Colo. 270, 117 Pac. 612, 36 L. R. A. (N. S.) 158; *Owens v. State*, 6 Okla. Cr. Rep. 110, 116 Pac. 345.

"The statute, therefore, which prohibits the teaching of the German language in a parochial school, does not unlawfully interfere with the right of religious freedom in the school or the incidental right to freely give religious instruction, as guaranteed by the Constitution."

And in *Nebraska District etc. v. McKelvie*, 187 Northwestern 927, the Nebraska court said in speaking of this language law:

"It appears to us that the law is a reasonable exercise of the police power and is not unconstitutional, as in violation either of the state or of the federal constitution. In its operation it does not deprive any person of life, liberty or property without due process of law, nor does it deny the equal protection of the law. *It does not interfere with religious liberty nor with the giving of religious instruction.*"

The distinction between religion and forms of worship is admirably discussed by Mr. Justice Field in *Davis v. Beason*, 133 U. S. 333. The laws of Idaho excluded a polygamist from the exercise of the elective franchise. Davis (a polygamist) was convicted of the violation of this statute and sought refuge as an adherent of the Mormon religion under the constitutional prohibition against interference with religion, claiming that he was indulging in polygamy in obedience to the mandates of his church. In affirming this conviction and disposing of the constitutional objections and pointing out that while freedom of worship according to conscience is guaranteed by the constitution, this guarantee does not permit persons to worship in any manner they may see fit and does not protect forms of worship, the court said:

"The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for His being and character, and of obedience to His will. It is often confounded with the

cultus or form of worship of a particular sect, but is distinguishable from the latter."

And in speaking of the constitutional protection of religion said:

"It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society designed to secure its peace and prosperity, and the morals of its people are not interfered with. However, free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

In the *Matter of Prazee*, 63 Mich. 396, in holding that Salvation Army street parades were subject to municipal traffic regulations, the Supreme Court of Michigan said:

"We cannot accede to the suggestion that religious liberty includes the right to introduce and carry out every scheme or purpose which persons see fit to claim as part of their religious system. There is no legal authority to constrain belief, but no one can lawfully stretch his own liberty of action, so as to interfere with that of his neighbors or violate peace and good order. *The whole criminal law might be practically superceded if under pretext of liberty of conscience, the commission of crime is made a religious dogma.*"

The use of the Polish or the German language is not at all essential to plaintiffs' religion although they may prefer to employ it in their manner and method of worship. The aim of the plaintiffs is the initial instruction of the child in German, so that in the language of the plaintiffs' witness, the Rev. Henry Erk (Record, p. 25, Q. 35), the German language may become the language of the heart. The religious necessity of the use of German is merely a cloak to cover the



effort to make German rather than English the language of the heart. Perhaps 10% of the plaintiffs' parishioners do not have sufficient knowledge of the English language to comprehend religious exercises, but instead of teaching English to the 10% the plaintiffs claim the constitutional right to teach German to the 90%. If plaintiffs were permitted to do this German would be perpetuated rather than displaced.

### III.

The Nebraska Foreign Language Statute (Norval Law) is neither an unreasonable nor arbitrary classification.

The plaintiffs argue (brief of plaintiffs in error, p. 25) that the statute is an arbitrary and unreasonable classification, because it prevents persons in Nebraska, who talk in foreign tongues from having their children instructed in foreign languages, and prevents them from hiring tutors to give religious instruction to their children in foreign languages. An examination of the statute shows that the prohibitions contained therein only apply to public, private, denominational and parochial schools and only apply (with the exception of the discrimination section, which is not argued by plaintiff) to children who have not passed the eighth grade. There is nothing in the statute which prohibits a parent from employing a tutor to teach his children German, Polish or any other language. The act merely applies to aggregations of children in schools.

The plaintiffs' argument is based on the theory that somewhere there exists an inalienable personal right to propagate the German language and other foreign languages in America. There is no such right. The statute is general in its application. This point is well handled by the decision of the Supreme Court of Nebraska in the following language (Record p. 84) :

"It is claimed that the law is discriminative. It applies, however, to all schools generally. It covers all of the schools, where, it is well known, children now receive their education. It operates equally upon all children



who have not had an eighth grade education and a knowledge of English which will be consequent therefrom. *Private instruction by a hired tutor, whether within or without the scope of the law, is instruction which is negligible in its extent.* In either event, the law operates in that matter without discrimination. The use and resulting knowledge of a foreign language in the home is not restricted, nor is instruction there prohibited. The exception of Sabbath schools from the law has been placed there with the evident purpose of preventing interference with religious exercises. It is not essential to the validity of the law that it should be a complete and absolute prohibition against the teaching of foreign languages. It was not intended to be such. The law is a regulation of such teaching, and not a prohibition. The qualifications made are not without reasonable basis, and cannot be said to be purely arbitrary."

The condition for which remedy was sought by the Nebraska legislation arose from the teaching of foreign languages to young children in parochial schools before such children had mastered English. The result of teaching German as the mother tongue to a lad born in America proved to be bad. The legislature guarded against it in the statute which it enacted under the police power.

The Supreme Court of the United States in many cases has held that a legislature was vested with considerable discretion in classifying occupations to which regulatory legislation could be applied.

In *Miller v. Wilson*, 236 U. S. 373, the following language was used by Mr. Justice Hughes in passing upon a California statute prohibiting employment of women in certain specified industries more than eight hours per day attacked as an arbitrary invasion of personal rights contrary to the Fourteenth Amendment:

"We are thus brought to the objections to the act which are urged upon the ground of unreasonable discrimination. These are (1) the exception of women employed in 'harvesting, curing, canning or drying of any variety of perishable fruit or vegetable,' (2) the omission of those

employed in boarding houses, lodging houses, etc., (3) the omission of several classes of women employees, as for example stenographers, clerks and assistants employed by the professional classes, and domestic servants, and (4) that the classification is based on the nature of the employer's business and not upon the character of the employee's work.

"With respect to the last of these objections, it is sufficient to say that the character of the work may largely depend upon the nature and incidents of the business in connection with which the work is done. The legislature is not debarred from classifying according to general conditions; otherwise, there could be no legislative power to classify. *For it is always possible by analysis to discover inequalities as to some persons or things embraced within any specified class.* A classification based simply on a general description of work would almost certainly bring within the class a host of individual instances exhibiting very wide differences. It is impossible to deny to the legislature the authority to take account of these differences and to do this according to practical groupings in which, while certain individual distinctions may still exist, the group selected will as a whole fairly present a class in itself. Frequently such groupings may be made with respect to the general nature of the business in which the work is performed; and, where a distinction based on the nature of the business is not an unreasonable one considered in its general application, the classification is not to be condemned. (See *Louisville & Nashville R. R. v. Melton*, 218 U. S. 36, 53, 54.) \* \* \* The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulations, to extend it to all cases which it might possibly reach. *Dealing with practical exigencies, the legislature may be guided by experience.* *Patzone v. Pennsylvania*, 232 U. S. 138, 144. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not

necessary that the prohibition 'should be couched in all-embracing terms.' *Caroll v. Greenwich Insurance Co.*, 199 U. S. 401, 411. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keokee Coke Co. v. Taylor*, 234 U. S. 224, 227."

In *Lindsey v. Natural Carbonic Gas Co.*, 220 U. S. 61, the court said:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these:

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.

"2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

"3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

"4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Batchel v. Wilson*, 204 U. S. 36, and other cases."

See *Johnston v. Kennecott Copper Corp.*, 248 Fed. 407, (Circuit Court of Appeals, Ninth Circuit) upholding legislation in respect to mining concerns employing five or more persons as against the charge that this was unlawful discrimination and classification.

In *Halter v. Nebraska*, 205 U. S. 34, Nebraska legislation prohibited the printing of any advertisement upon the American flag and the use of the flag as an advertising medium was sustained. Many excellent expressions illus-

trative of the police power are used in the decision. One of the arguments against the validity of the legislation was that the statute expressly permitted the use of the flag on magazines. The court disposed of this objection in a summary manner, holding there was no illegal discrimination and no unlawful classification and that the exemption of magazines from the general prohibition against promiscuous use of the flag for advertising purposes rested upon reasonable grounds.

In *Quong Wong v. Kirkendall*, 223 U. S. 59, a law imposing a tax on hand laundries not employing women was upheld as against the argument that it was intended as an unlawful discrimination against Chinese laundries. In discussing the legislative power of the state this court said at page 62:

"It may make discriminations, if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary, as was illustrated in *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89; *Williams v. Fears*, 179 U. S. 270; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 469. \* \* \* The criminal law is a whole body of policy on which states may and do differ."

The case further held that a state may carry out a policy with the wisdom of which this court may disagree.

Other cases holding that a state may exercise reasonable discretion in classifying occupations which are regulated or prohibited, are

*Wilson v. New*, 243 U. S. 332.

*Pitney v. Washington*, 240 U. S. 387.

*Tanner v. Little*, 240 U. S. 369.

*McLean v. Arkansas*, 211 U. S. 539.

*Murphy v. California*, 225 U. S. 623.

*Lower Vein Coal Co. v. Industrial Board of Indiana*,  
255 U. S. 144.

The excerpt from *Yick Wo v. Hopkins*, 118 U. S. 356, quoted on pages 25, 26 and 27 of plaintiffs' brief as well as other isolated extracts from other Supreme Court opinions likewise quoted in plaintiffs' brief are of little benefit in the solution of the problem before the court. We are not so much concerned in what the court says or with the language used in an opinion as we are in the decision itself, in what the court does, and it is desirable in respect to those cases cited by plaintiffs to examine the facts and see what the decision really was. In *Yick Wo v. Hopkins*, *supra*, an ordinance of the city of San Francisco, which prohibited the conduct of a laundry business in the city limits without a permit from the municipal authorities, the granting of which was not based upon compliance with conditions but rested in the arbitrary will of the supervisors, and which the facts show was used for the sole purpose of discriminating against Chinamen, was held unconstitutional as depriving a person of equal protection of the laws.

The distinction between this case and *Barbier v. Connolly*, 113 U. S. 27, is that in the *Yick Wo* case the ordinance conferred arbitrary power upon the supervisors to give or withhold laundry permits without regard to the competency of the applicant, the proposed location of his laundry, fire hazard, or upon any reasonable classification. The evidence showed that such an ordinance was an arbitrary and unjust discrimination founded on a difference in race between persons who otherwise were in similar circumstances, and the court held it to be contrary to the protection of the Fourteenth Amendment, which guaranteed all rights without regard to the race, color or nationality.

There is no arbitrary, personal or racial distinction in the Nebraska Foreign Language Statute. The Act applies to all who attempt to ground Nebraska children in foreign languages before they have learned English. In its general application the Nebraska statute more nearly corresponds to the ordinance in *Barbier v. Connolly*, 113 U. S. 27, and the law in

*Lower Vein Coal Co. v. Ind. Board of Ind.*, 255 U. S. 144, than it does to the ordinance in the Yick Wo case. The prohibition in the Nebraska statute is based upon known evils and past experience and not on a racial classification of persons. We have provisions for universal suffrage in America, but this does not prevent legislation confining the right of suffrage to persons twenty-one years of age or over. Every person may have a right to study any language, but this does not prevent legislation requiring a person to be grounded in English, to have passed an eighth grade examination, before he is permitted to receive instruction in schools in foreign languages.

We have no quarrel with the decision of *Traux v. Raich*, 239 U. S. 33, or *Traux v. Corrigan*, 66 L. Ed. 133, set forth on pages 27, 28 and 29 of plaintiffs' brief. In *Traux v. Raich*, *supra*, this court considered an Arizona statute, which prohibited the employment of more than 20% alien laborers by persons, companies or corporations doing business in Arizona. The holding was that the Fourteenth Amendment applied to any person within the jurisdiction and consequently to aliens; that the Arizona statute arbitrarily deprived many aliens of their right to work; that this is a distinction based upon nationality; that the control of immigration was vested in the federal government, and that a state court cannot assume control of immigration by passing an act forbidding an alien to work, and consequently compelling him to move and starve. Of course, that Arizona statute contravened the Fourteenth Amendment. The Nebraska Foreign Language Act is not based upon any difference in race, color or previous conditional servitude, but was based upon its existence of and enacted to remedy a known and recognized evil.

In *Traux v. Corrigan*, *supra*, this court held, although four judges dissented, that an Arizona statute, which denied an employee equitable relief from unlawful picketing deprived such employer of property without due process of law, and denied him equal protection of law. The case is based on

the protection of property rights. There are no property rights involved in the case at bar.

In *Hayes v. Missouri*, 120 U. S. 68, quoted on page 30 of plaintiffs' brief, a Missouri statute giving the state fifteen challenges in criminal cases arising in cities of 100,000 population and only eight in cases in other places was held a reasonable classification and not unconstitutional. The court held that the constitutional guarantee of a trial by an impartial jury was not infringed, saying:

"The number of challenges must necessarily depend upon the discretion of the legislature and vary according to the conditions of different communities and the difficulties in them of securing intelligent and impartial jurors. The whole matter is under its control."

Large cities contain such a mixed population, urban business men are so prone to escape jury service, that giving the state fifteen challenges seems a wise precaution.

In *Missouri v. Lewis*, 101 U. S. 22, cited on page 31 of plaintiffs' brief, Missouri legislation provided for an appeal only to the St. Louis Court of Appeals in cases arising from the city of St. Louis, while appeals to the Supreme Court of Missouri were permitted in other cases, was held not to abridge any rights guaranteed under the Fourteenth Amendment.

In *Magoun v. Ill. Trust & Savings Bank*, 170 U. S. 283, cited on page 31 of plaintiffs' brief, an Illinois inheritance tax levying different amounts on different degrees of relationship was held to be a classification, which the legislature had power to make and which did not conflict with the federal constitutional provisions.

A reasonable classification is permitted without doing violence to the constitutional provisions as to equal protection of the law. Such classification must be based upon a real and substantial distinction bearing a reasonable and just relation in respect to the purposes of legislation. The classification in the Nebraska statute rests upon the passage of the



eighth grade examination. The legislature realized that it was a menace to the state to have children growing up within its borders thinking of German as the language of their heart and as their mother tongue. It determined that all children should be grounded in English before taking up foreign languages and fixed the eighth grade as a reasonable point where the study of foreign languages could be commenced without danger to the state. The plaintiffs' theory of an inalienable constitutional, guaranteed right to not only talk German, but to spread it, propagate it, educate children in it and make it the language of the heart has no support in any adjudicated cases. Nowhere is it defined as a privilege or an immunity guaranteed to American citizens.

#### IV.

**The Nebraska Foreign Language Statute does not unlawfully interfere with property rights or personal liberty.**

It is urged that the right to pursue a legitimate vocation is within the rights guaranteed by the Fourteenth Amendment, that the teaching of German is a legitimate occupation and is likewise guaranteed (brief of plaintiff in error, p. 20).

The liberty guaranteed to the individual by the Fourteenth Amendment is not the liberty enjoyed by primitive man. Personal liberty in the present stage of civilization is always subordinate to the public good. Doubtless the occupation of a foreign language teacher is somewhat interfered with. The enactment of prohibitory legislation seriously handicapped many bar-tenders. Until the passage of regulatory statutes making it unlawful one could legally sell cigarettes to minors. Before the enactment of forgery statutes one could alter bank paper at his pleasure. But these rights were not guaranteed to the individual in perpetuity. With the enactment of the prohibition laws we all lost our right to transport and vend intoxicants. Prohibition laws do not violate the Fourteenth Amendment because they affect the property value of a brewery. *Mugler v. Kan-*



*sas*, 123 U. S. 623. Regulatory legislation, upheld by our courts has made all these things criminal. At one time the receipt of rebates led to the establishment of the greatest fortune in America, now their acceptance would lead to the penitentiary. One has no inalienable right to sell liquor or tobacco, receive rebates, run an automobile at high speed or carry a pistol. As society progresses and sets a higher standard many acts become unlawful which were previously legitimate. The occupation of a foreign language teacher was and still is a legitimate one. Such method of livelihood is not seriously impaired by the Nebraska legislation. In the future a teacher is confined in the exercise of his talents to children who have passed the eighth grade, just as tobacco dealers must confine their sales to persons who have attained their majority.

Prior to the female labor acts a woman could work as many hours as she desired, to the detriment of her health, but it has been held that a curtailment of her liberty to work was not a violation of the Fourteenth Amendment.

*Wenham v. State*, 65 Neb. 395.

*Muller v. Oregon*, 208 U. S. 412.

Ordinarily, conducting a laundry is a legitimate occupation, but the prohibition of laundry work within certain territorial limits in San Francisco between 10 A. M. and 6 P. M. was construed to be a police regulation not prohibited by the Fourteenth Amendment.

*Barbier v. Connolly*, 113 U. S. 27.

That case is so instructive on the question of discrimination and personal liberty that we set forth the following excerpts from it:

"The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and

security should be given to all under like circumstances in the enjoyment of their personal and civil rights, that all persons should be entitled to pursue their happiness and acquire and enjoy property, that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts, that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances, that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

The right to choose or pursue a legitimate vocation is within the constitutional guarantee but the state has power within reasonable limits to determine what is and what is not a legitimate occupation and to determine when the same can be carried on.

Even as far back as the *Slaughter House Cases*, 16 Wall. 36, this court has held that while the butchering of animals was a legitimate occupation, yet the city of New Orleans under its police power could restrict the slaughtering of animals to certain buildings and places within the city limits. If the slaughtering of animals is so affected by the public interest as to permit its regulation by municipal authority, surely the early education of the citizens of a state is also sufficiently fraught with public interest to permit its regulation by the state in its own interest and for its own protection. It may be noted that the quotation from the *Slaughter House cases* on page 8 of the brief of the plaintiff in error was from the dissenting opinion in that case and not from the judgment of the court, as was also the quotation from Mr. Justice Harlan in *Berea College v. Kentucky*, 211 U. S. 45; the actual holding in the *Berea College* case being that a statute prohibiting instructions to whites and negroes in the same incorporated school was not invalid.

The sweeping language used in *Allgeyer v. Louisiana*, 165 U. S. 578, and in *Adair v. United States*, 208 U. S. 161, quoted on pages 8 and 12 of defendant's brief, was modified and restricted by this court in *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, a case that involved the validity of an Iowa statute granting a right of action to injured railway employees regardless of whether they had released the carrier from liability by contribution to or accepting the benefits of the carrier's relief or insurance scheme.

In upholding the constitutionality of this statute as against the objection that it was against public policy and that it interfered with the constitutional freedom of contract, and after expressly referring to *Allgeyer v. La.*, 165 U. S. 578,

and *Adair v. U. S.*, 208 U. S. 161, and in restricting the language used in those opinions, this court said:

"But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community. *Crowley v. Christensen*, 137 U. S. p. 89; *Jacobson v. Massachusetts*, 197 U. S. p. 11. 'It is within the undoubted power of government to restrain some individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services or property.' *Frisbie v. United States*, 157 U. S. pp. 165, 166.

"It is subject also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction. This limitation has had abundant illustration in a variety of circumstances. Thus, in addition to upholding the power of the state to require reasonable maximum charges for public service (*Munn v. Illinois*, 94 U. S. 113; *C. B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155; *Railroad Commission Cases*, 116 U. S. 307; *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19), and to prescribe the hours of labor for those employed by the state or its municipalities (*Atkin v. Kansas*, 191 U. S. 207). This court has sustained the validity of state legislation in

prohibiting the manufacture and sale of intoxicating liquors within the state (*Mugler v. Kansas*, 123 U. S. 623; *Crowley v. Christensen*, *supra*); in limiting employment in underground mines or workings, and in smelters and other institutions for the reduction or refining of ores or metals, to eight hours a day except in cases of emergency (*Holden v. Hardy*, 169 U. S. 366); in prohibiting the sale of cigarettes without license (*Gundling v. Chicago*, 177 U. S. 183); in requiring the redemption in cash of store orders or other evidence of indebtedness issued in payment of wages (*Knorrville Iron Co. v. Harbison*, 183 U. S. 13); in prohibiting contracts for options to sell or buy grain or other commodity at a future time (*Booth v. Illinois*, 184 U. S. 425); in prohibiting the employment of women in laundries more than ten hours a day (*Muller v. Oregon*, 208 U. S. 412); and in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal, instead of the weight of the coal as originally produced in the mine (*McLean v. Arkansas*, 211 U. S. 539).

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

"The principle was thus stated in *McLean v. Arkansas*, 211 U. S. 547, 548: 'The legislature being familiar with

local conditions, is primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. (Cases cited.) \* \* \* *If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.*"

The case holds that in dealing with the relation of employer and employee, that the state legislature necessarily had a wide field of discretion in order to protect the health and safety of workmen, to promote peace and good order, and to insure wholesome conditions of work and freedom from oppression and that the granting of a right of action to injured employees regardless of whether or not they had involved themselves in the carrier's "relief plan" was within the reasonable discretion of the Iowa legislature and was not contrary to the federal constitution.

Surely if the state may legislate to protect its workmen, it may also legislate in respect to the education of the children in such a way as to insure a high standard of citizenry and a more intelligent basis and foundation for the state government.

In *Lawton v. Steele*, 152 U. S. 133, after detailing the instances of the proper exercise of the police power, such as regulation of slaughter houses, prohibition of wooden buildings in fire limits, regulation of railways, compulsory vaccination, confinement of the insane and those afflicted with contagious diseases, suppression of obscene publications, prohibition of gambling and sale of intoxicants, the court said:



"Beyond this, however, the state may interfere whenever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier v. Connolly*, 113 U. S. 27; *Kidd v. Pearson*, 128 U. S. 1. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally as distinguished from those of a particular class require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."

The case involved the right of the state to confiscate and destroy without judicial process fish nets used in illegal fishing.

In *Erie Railroad Company v. Williams*, 233 U. S. 685, which involved a statute of New York requiring railroad companies to pay employees semi-monthly, and which was sustained as a valid exercise of police power as well as a valid exercise of the state's rights to control corporations, in speaking of the guaranty of personal liberty under the constitution, and in holding that it includes the right to contract in respect to time and payment of wages the court said:

"But liberty of making contracts is subject to conditions in the interest of the public welfare and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest

conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. *C. B. & Q. R. R. Co. v. McGuire*, 219 U. S. 549, 565; *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389. \* \* \* (and at page 704) But whether the law imposes an unjust burden depends upon its validity, and whether the public welfare is subserved by one system or the other is, as we have said in the first instance, for the legislature to determine, and its judgment will not be reviewed unless 'unmistakably and palpably in excess of legislative power.' *McLean v. Arkansas*, *supra*, 211 U. S., p. 547."

It will be noted that *Gouled v. U. S.*, 255 U. S. 289, 303, cited on pages 22 and 23 of plaintiffs' brief as an authority in respect to personal liberty involved the Fourth Amendment and not the Fourteenth, and was a case involving searches and seizures. The language quoted on page 23 of plaintiffs' brief does not apply in the slightest to the state of facts involved in this language litigation. The language of an opinion should be used in reference to the facts and to the decisions. The words "judgment affirmed" cannot be used to advantage by the defendant in error in every case. The *Gouled* case was a conviction for the misuse of the mails in attempting to promote a scheme to defraud the government as to army quartermaster contracts to supply clothing. The defendant's office was searched by detectives without warrant of law, certain papers seized, used by the prosecuting attorney and then returned to the defendant. All this case holds is that the use of papers obtained through an unlawful seizure was improper and in violation of the constitutional provision that one cannot be compelled to give evidence against himself. Personal liberty under the Fourteenth Amendment, equal protection of law, and property rights are not at all involved.

In dealing with liberty of contract, this court in *Miller v. Wilson*, 236 U. S. 373, in considering a California statute prohibiting the employment of women in certain industries, attacked on the ground that it was an arbitrary invasion of personal rights contrary to the Fourteenth Amendment, said:



"As the liberty of contract guaranteed by the constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest—the question is whether the restrictions of the statute have reasonable relation to a proper purpose. *C. B. & Q. R. R. Co. v. McGuire*, 219 U. S. 549, 567; *Erie R. R. v. Williams*, 233 U. S. 685, 699; *Coppage v. Kansas*, *ante*, pp. 1, 18. Upon this point the recent decisions of this court upholding other statutes limiting the hours of labor of women must be regarded as decisive."

In respect to interference with property rights; the property rights of the plaintiffs in this case are assumed and asserted rather than proven. It may be true that plaintiffs have \$250,000.00 invested in schools throughout the state, but the value of these schools does not depend upon whether or not a foreign language is taught within them to young children. The value of the real estate remains the same. All property is held subject to the police power. The fact that real estate may be used for the brewing, distillation or dispensing of malt and spirituous liquors does not prevent the passage and enforcement by a state of prohibition legislation.

*Mugler v. Kansas*, 123 U. S. 623.

In fact if plaintiffs would use their schools for the diffusion of American ideals and for instruction in English rather than in foreign tongues their value would be enhanced rather than diminished. The number as well as the quality of additional pupils they would attract by the adoption of this system of education would more than compensate for the few they would lose. If plaintiffs' schools exist for educational and religious purposes neither is affected by the foreign language legislation. If these schools were founded to perpetuate foreign languages and foreign ideals in the hearts of American children, then they deserve to be closely regulated if not abolished.

All property as well as personal liberty is held and enjoyed subject to the police power, of which this statute, as we urge in Point I, is a reasonable exercise.

## V.

Under the police power the State has the right to regulate schools and courses of study.

It is urged on pages 61 to 63 of plaintiffs' brief that parents have a right to educate their children in schools in any subjects they deem proper, a right superior to that of the state to supervise such an education, and two Nebraska cases: *State v. School District*, 31 Neb. 552, and *State v. Ferguson*, 144 N. W. 1039, are cited in support of this theory. An examination of these two cases shows that they turn on the construction of a Nebraska statute rather than on any broad principle of fundamental rights. These cases were authority in Nebraska only and insofar as they bear on this foreign language litigation they have been overruled and superseded by the cases of *Nebraska District Evangelical Synod v. McKelvie*, 104 Neb. 93, 187 Northwestern 927, and by *State v. Meyer*, 187 Northwestern 100.

The power of the state to regulate or prohibit private schools is subject to the same limitations as the power to regulate property rights in general. The legislature under the police power may regulate education in private schools, but of course the exercise of such police power must not be arbitrary and must be limited to the preservation of the public safety, the public health, the public morals and the public welfare.

In *Berea College v. Kentucky*, 211 U. S. 45, a Kentucky statute which forbade any corporation maintaining schools attended by both whites and negroes was upheld.

In *Andrew v. Webber*, 108 Ind. 31, it was held that school authorities have the right to determine the course of study, which pupils must follow under penalty of expulsion.

In *State v. Bailey*, 157 Ind. 234, 329, although a decision by a state court, the language used is such a clear exposition of the principle that it will bear quotation, and is as follows:

"The natural rights of a parent to the custody and control of his infant child are subordinate to the power of the state and may be restricted and regulated by municipal laws. \* \* \* The matter of education is deemed a legitimate function of the state and with us is imposed upon the legislature as a duty by imperative provisions of the constitution. \* \* \* The subject has always been regarded as within the purview of legislative authority. How far this interference should extend is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with this exercise of legislative judgment; and to do so would be to invade the province, which by the constitution is assigned exclusively to the lawmaking power."

On the same general principle the case of *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389, is instructive. This court in that case held that a statute of Kansas intended to regulate fire insurance rates and exempting co-operative companies, insuring farm buildings, from such regulation was valid under the federal constitution.

Surely if as the court held in that case the business of fire insurance was so "clothed with a public interest" that it was subject "to be controlled by the public for the public good" if the storage of grain in public warehouses may be regulated (*Munn v. Ill.*, 94 Ill. 113; *Budd v. N. Y.*, 143 U. S. 517) as well as interest rates, transportation charges, hotel accommodations, hours of labor, location of industries, conduct of banking, renting of apartments, then surely schools, both public and parochial, the education of the young, the development of citizens is of sufficient public interest to sustain statutory regulation by a sovereign state. The test is public interest, not devotion of property to a general public use. The right to demand and receive service is not the test of the right to regulate. Private persons and private property lose their private character and become clothed with sufficient public interest to warrant regulation, when used or employed

in matters of public consequence, which affect the community at large.

The underlying principle is that businesses of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation.

The court goes on to say that the statute was not unlawfully discriminatory, because it exempts co-operative companies insuring farm property, holding that a discrimination is valid if not arbitrary, if it is not "outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear and degrees of evil may determine its exercise. *Ozan Lumber Co. v. Union Co. Bank*, 207 U. S. 251. There are certainly differences between stock companies such as complainant is and mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the legislature. *Orient Ins. Co. v. Doggs*, 172 U. S. 557."

From the testimony and from the argument in the plaintiffs' brief, it would appear that the use of a foreign language was justified, and in fact necessary in the teaching of English, that it is necessary to use German to teach a German boy English. Plaintiffs in this argument overlooked the fact that in the English instruction to foreigners, as given in the night schools of New York City, English alone is employed. The well known Berlitz system of foreign language instruction is based on instruction in the foreign language alone. We all came into the world with no knowledge of any language, and most of us learned English from hearing it spoken. A German child may be taught English in the same way. It is not necessary to teach him more German in order that he may learn a little English or to use German to instruct him in English.

The opinions of well known educators on foreign language teaching are instructive and entirely refute plaintiffs' argument.

Charles Hart Handschin, Professor of German in Miami University, in Bulletin No. 3 of 1913 of the United States Bureau of Education on page 31 declares that from the time the teaching of German was introduced into the United States (at Germantown, Pa., in 1702) the object was to enable the young to understand German sermons and to keep German ideals before them in home and in school, and that the English language was often excluded from the curriculum of such schools.

Professor Handschin (pp. 94 to 101) in foreign language instruction advocates the natural or direct method whereby the language sought to be taught is alone the medium of instruction.

Leopold Bohlson, a German Oberlehrer in the Realschulen of Berlin, Lecturer on methods of teaching French and German in the Teachers College of Columbia University in 1902 and 1903, and Imperial Commissioner to the St. Louis Exposition, in his work entitled "The Teaching of Modern Languages," says on page 22:

"In teaching of languages the pupil should be trained to converse with the instructor in the foreign tongue; that there is not the least doubt that the foreign language must be spoken in the class; that in teaching a foreign language one must get into the foreign spirit, and in teaching German have a map of Germany in the classroom, pictures of great Germans and of characteristic German landscapes."

In a discussion of the analytic inductive method of teaching languages advocated by the author, the predominate thought is to get away from the mother tongue and get bodily into the foreign language. He quotes Martin Hartmann, the great language teacher of Saxony, who urged the employment of methods, which teach a foreign language without the mediation of the familiar native tongue.

Otto Jespersen, Ph. D., Professor of English in the University of Copenhagen, in his work "How to Teach a Foreign Language," published in London in August, 1917, declares that a foreign language should be taught by means of the foreign language itself and says on page 48:

"The popular opinion among those, who have not thought the matter over, or who have not given sufficiently careful attention to their own mental processes is that a foreign language can be understood only by transposing it into ones mother tongue, but this is not so. In teaching a Dane English, you must transplant him into English bodily and not through the medium of translation into English. I directly and spontaneously connect the idea with the language in which it is expressed without going through any roundabout method through the words of the native language."

Throughout his whole work of 192 pages Professor Jespersen urges and advocates the use of a foreign language alone in foreign language teaching.

Other works advocating the direct method of language instruction by the medium of the language alone by noted pedagogues are:

"Fur Kleine Leute," by A. T. Gronow, published by Ginn & Co.

"Die Direkte Method." by Marc. De. Valette, published by Wm. Jenkins Co., N. Y.

According to the latest methods of teaching languages, to teach a German boy English, English should be used from the start. It is not necessary to teach him more German in order to teach him more English.

#### **ANSWERING THE ARGUMENT OF PLAINTIFF'S BRIEF.**

The defendants agree with the plaintiffs' statement of the case on pages 1 to 3 of plaintiffs' brief, but take issue with every contention set forth on the latter pages. The allega-

tions of the intervenor's petition were merely asserted and not proved (Record pp. 2 to 13, 33 to 70).

In the description of the "Intent and Purpose of the Act" on page 14 of their brief, plaintiffs fall into many errors. The act does not prohibit the giving of instruction in any subject in any foreign language at any time by any person, but merely regulates foreign language instruction by, so far as schools are concerned, confining it to pupils who have passed the eighth grade.

It does not prohibit the study of any subject in any language other than English by any person in any school. Such study is not mentioned in the act. The use of a foreign language only is prohibited.

Instruction through the medium of foreign languages in private, denominational or parochial schools is only prohibited to children under the eighth grade.

The prohibitions in the act are merely incidental. The purpose of the act is to insure the grounding of Nebraska children in the English language. *By our experience in the Meyer case, 187 Northwestern 100, our legislature learned that the only practical method of insuring instruction in the English language was to absolutely prohibit the instruction in German to children under the eighth grade. If this was not done five minutes of instruction in English would be given and several hours of instruction in German.*

The opinions of Herbert Spencer and John Stuart Mills, set forth on page 24 of the plaintiffs' brief are interesting as the opinions of advanced thinkers, but after all they are merely opinions, and we are governed by the legislation enacted in the laws of the state, rather than by the opinions of noted persons. Practically all advanced legislation has been opposed by some men of pronounced intellectual attainments.



In the language of the court in *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389:

"Against that conservation of the mind, which puts to question every new act of regulating legislation, and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare, and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the constitution of the United States. The dread of the moment having passed no one is now heard to say that rights were restrained or their constitutional guaranties impaired."

Many of the citations in plaintiffs' brief lose their value when one examines their connection and sees what was actually decided. For instance the case of *Arver v. United States*, 245 U. S. 366, is cited on page 36 of plaintiffs' brief, as an authority to the effect that the Nebraska statute abridged the immunities of a citizen of the United States. The *Arver* case was the case sustaining the validity of the draft law as against the argument that the selective draft interfered with religious beliefs and imposed involuntary servitude.

To refute the argument on page 48 of plaintiffs' brief that in Nebraska we consider it dangerous to the welfare of the state the study of the works of Virgil, Homer, Dante or Goethe in the original language, it is only necessary to compare plaintiffs' argument with the statute itself. There is nothing in the statute which prohibits the study of the works of Grotius in the original tongue. The assertion on page 48 of plaintiffs' brief: "The lawyers who undertake the study of the original Code Napoleon are subject to prosecution; the student of the drama who would study the original of Moliere is subject to a jail sentence of thirty days. If the act in question is valid, the ambitious seekers after truth, who desire to study in a school in the original languages the Divine Comedy



of Dante, the Dialogues of Gallileo, or the Philippias of Demosthenes, will be required to engage in this dangerous and hazardous occupation outside the territorial confines of Nebraska." is false as well as exaggerated. Our statute does not prohibit anyone who has passed the eighth grade from studying a foreign language or from studying foreign authors in foreign tongues. The number of children under the eighth grade, who would desire to study the works of Grotius, Demosthenes, Voltaire or Kant in the original Greek, Italian, Greek and French are negligible in Nebraska.

The argument on page 51 of plaintiffs' brief that the Nebraska Foreign Language Act is freak legislation does not take into consideration that twenty-one other states have passed similar legislation set forth on pages 25-31 of this brief.

The fact that our statute was enacted on April 14, 1921, two years after the cessation of hostilities in the world war shows that it was not a form of war hysteria.

Plaintiffs' whole argument that the act is undesirable should have been addressed to the legislature rather than to this court. This court has answered all such arguments in the following language of Judge Field in the case of *Mobile County v. Kimball*, 102 U. S. 691, a case sustaining legislation authorizing a bond issue for Mobile County to be used in the improvement of Mobile Harbor:

"But this court is not the harbor, in which people of a city or county can find a refuge from ill-advised, unequal and oppressive state legislation. The judicial power of the federal government can only be involved when some right under the constitution, laws or treaties of the United States is invaded. In all other cases the only remedy for the evils complained of rests with the people and must be obtained through a change in their representatives."

### CONCLUSION.

The American government created by our forefathers, maintained by our citizenry, cherished from generation to generation for the public weal, constantly changing to accommodate itself to the advancement of mankind, is the greatest human creation of the latter centuries. In the idealistic beauty of its conception it surpasses the Taj Mahal. In its balanced representation and co-ordination of power it excels the symmetry of the Athenian Parthenon. We trust it will endure as the Pyramids of Egypt. Its foundations rest on the intelligence and the solidarity of the electorate.

When the Higher Power observed the efforts of the people on the plains of Shinar to build a city supplemented by a tower which would suffice to protect them from the wrath of God in the form of flood waters, He said: "Behold, they are one people with one language, and nothing that they undertake shall be withholden from them." The method adopted to check the building of the tower was to confuse the tongues of the workmen so that they were unable to communicate with each other. As a result the Tower of Babel can no longer be distinguished from the sands of the desert. This court will never classify the English language and the American government as a threatened menace as Jehovah considered the Tower of Babel. We trust that the same insidious peril to the American government will not be permitted by this court, and that the method employed in Nebraska by the people of Nebraska for the safety of the state will not be curtailed.

Our foreign language statute is merely the exercise by the state of the right of the state to so supervise the education of its youth that in Nebraska the language of our country shall be the language of the heart.

In the development of our Republic let our standard be:  
One God, the God of our fathers; one flag, the banner symbolizing the bitter sacrifices of American soldiers in the field from Valley Forge to the Meuse-Argonne; one language, the tongue of the land where these plaintiffs have sought asylum.

Respectfully submitted,

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Dated Lincoln, Nebraska, December 1, 1922.

FEB 19

IN THE

# United States Supreme Court

NEBRASKA DISTRICT OF EVANGELICAL  
LUTHERAN SYNOD OF MISSOURI,  
OHIO, AND OTHER STATES, ET AL.,  
*Plaintiffs in Error,*

vs.

SAMUEL R. McKELVIE, CLARENCE A.  
DAVIS, OTTO F. WALTER AND THEIR  
DEPUTIES, SUBORDINATES, AND  
ASSISTANTS,

*Defendants in Error.*

No. 440

## REPLY BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

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## REPLY BRIEF IN BEHALF OF PLAINTIFFS IN ERROR.

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### STATEMENT.

The brief of the plaintiffs in error in Meyer vs. State, No. 325, discusses questions very similar to those involved in the instant case. The law involved in the Meyer case was passed in 1919. The supreme court of Nebraska in Nebraska vs. McKelvie, 104 Nebr. 93, held that act constitutional. By construction, the court eliminated the objectionable parts of the act. The legislature of 1921 repealed the 1919 act and passed the act that is involved in the instant case. The objections made to the constitutionality of the act of 1921 apply with equal force to the act of 1919.

## WAR RESENTMENT.

The quotations from the laws of the various states which are reproduced in the state's brief, beginning on page 25, show that practically all of this language legislation was passed in 1918 and 1919. The purpose of practically all of these laws is to regulate the study of foreign languages. Very few states have attempted to prohibit the use and study of foreign languages. Language prohibition is an aftermath of the world war. It is the result of war resentment. *It is not based on any substantial or well defined reason. It is not "put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare."* Noble State Bank vs. Haskell, 219 U. S. 104, 111; 55 Law. ed. 112, 116.

Following the Revolution, some of the colonies passed laws for the purpose of confiscating the property of the Tories. The records of this court show that following the Civil War there were many efforts made to over-reach the rights of citizens by passing legislation that denied those who sided with the confederacy the rights guaranteed to them by the constitution. It was war resentment that caused our colonial ancestors to attempt to unconstitutionally discriminate against the Tories. It was war resentment that caused the enactment of the bills of attainder, ex post facto laws, and the bills of pains and penalties that immediately following the Civil War.

During the world war it was necessary to stimulate the latent patriotism of our people. We not only developed the patriotism of our own country, but we also developed

resentment and hatred towards those with whom we were fighting. On every street corner, earnest and zealous men and women denounced "the Huns," and all others who were associated with them in the war. Prejudice, war resentment and hatred were unavoidable. This resentment was particularly strong as against the Germans. Before the war "Made in Germany" was a valuable recommendation in commerce. Since the war, it is necessary to conceal that fact.

The act in question is admittedly aimed at the German language. The state's brief admits that those who were effected by it are persons of either German birth or descent. The purpose is to prevent our children from learning German, or other foreign languages, at the time in life when it is most easy for them to do so. The whole theory of the law is one of retaliation. It has the effect of a bill of attainder on those who happen to use a language other than English in their home. In passing this retaliatory measure against the Germans, the fact is overlooked that it similarly effects the rights of the twenty-nine other nationalities who live in Nebraska and who either were born in continental Europe, or are the descendants of those who were born in continental Europe. The act in question outlaws the languages of all the people in Nebraska who come from continental Europe.

This court has held that no matter what the form of the legislation may be, if in its operation it has the effect of violating the constitution it is invalid. In many opinions, it has recognized the circumstances and conditions that have surrounded and induced legislative action. The fact that there is war resentment creates an atmosphere



in which the constitutional rights of a part of our citizens may be disregarded. One of the prime purposes of our constitution is to protect minorities in times of stress and excitement against outbursts of ill-will, intolerance and prejudice, as is illustrated by the following cases:

In *Cummings vs. Missouri*, 71 U. S. 277, 18 Law ed. 356, the question under consideration was the constitutional provision adopted by the state of Missouri, which attempted to deny those who had sided with the confederacy the right to teach school. In the opinion, Justice Field said on page 320:

“The disabilities created by the Constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that ‘to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all.’ The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors. The deprivation of any rights, civil or political, previously enjoyed, may be punishment; the circumstances attending and the causes of the deprivation determining this fact \* \* \* ”

And on pp. 321 and 322 he said:

“The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all

avocations, all honors, all positions, are alike open to everyone, and that in the protection of all these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

“Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty or property, but also embracing deprivation or suspension of political or civil rights, and the disabilities prescribed by the provisions of the Missouri Constitution being, in effect, punishment, we proceed to consider whether there is any inhibition in the Constitution of the United States against their enforcement.

“The counsel for Missouri closed his argument in this case by presenting a striking picture of the struggle for ascendancy in that state during the recent Rebellion between the friends and enemies of the Union, and of the fierce passions which that struggle aroused. It was in the midst of the struggle that the present Constitution was framed, although it was not adopted by the people until the war had closed. It would have been strange, therefore, had it not exhibited in its provisions some traces of the excitement amidst which the Convention held its deliberations.

“It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In *Fletcher vs. Peck*, 6 Cranch, 137, Mr. Chief Justice Marshall, speaking of such action, uses this language: ‘Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feeling of the moment; and that the people of the United States, in adopting that instrument have manifested a determination to shield themselves and their property from the effects

of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for people of each state.'

" 'No state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.'

"A bill of attainder is a legislative act, which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.

" 'Bills of this sort,' says Mr. Justice Story, 'have been most usually passed in England in times of rebellion, or gross subserviency to the Crown, or of violent political excitement; periods in which all nations are most liable (as well as free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others.' Story, Com. par. 1344."

And again on p. 325:

"The existing clauses presume the guilt of the priests and clergymen, and adjudge the deprivation of their right to preach or teach unless the presumption be first removed by their expurgatory oath—in other

words, they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law maker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

In *Ex Parte Milligan*, 71 U. S. 2, 18 L. ed. 281, Justice Davis in discussing the effect of the Constitution during war times, said, on p. 125:

"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time,

was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the Judiciary disturb, except the one concerning the writ of habeas corpus.

“It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of habeas corpus. In every war, there are men of previously good character, wicked enough to counsel their fellow citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit, in the exercise of a proper discretion, to make arrests, should not be required to produce the person arrested in answer to a writ of habeas corpus. The Constitution goes no further. It does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of common law. If it had intended this result, it was easy by the use of direct words to have accomplished it. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. Knowing this,

they limited the suspension to one great right, and left the rest to remain forever inviolable. But it is insisted that the safety of the country in time of war demands that this broad claim for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so."

In the recent case of *Brown vs. Feldman*, 256 U. S. 170, 65 L. ed. 877, Justice McKenna, said in the dissenting opinion:

"It is safer, saner and more consonant with constitutional pre-eminence and its purposes, to regard the declaration of the Constitution as paramount, and not to weaken it by refined dialectics, *or bend it to some impulse or emergency 'because of some accident of immediate overwhelming interest which appeals to the feelings, and distorts judgment.'*" *Northern Securities Co. vs. United States*, 193 U. S. 197, 400, 48 L. ed. 679, 726."

## NATURAL, INHERENT AND INALIENABLE RIGHTS.

“Natural rights are such as appertain originally and essentially to man—such as are inherent in his nature—and which he enjoys as a man—independent of any particular effort on his side, as, for example, the right of providing for one’s own preservation.” *Borden v. State*, 11 Ark. (6 Eng.) 519, 527.

In discussing the constitutional meaning of inherent and inalienable rights, an eminent judge said, in *State v. Phelps*, 144 Wis. 1, 128 N. W. 1041, 1045:

“Had the all-prevading concept of the declaration, which marked the change in our system of constitutional liberty, been from the first given the dignity that it commanded and has latterly received, instead of being regarded as in the nature of a rhetorical embellishment, or a sort of apostrophe to something sentimental rather than real, the very ideas which it was designed to entrench as fundamental law would not have been somewhat lost sight of.

“Formerly, in general conception, there were no rights, strictly so-called. There were privileges which came directly or indirectly, by grace from sovereign authority. That was the crowning mischief of the Colonial period which was sought to be removed. Hence, *at the start, things essential to our welfare which had been enjoyed so far as enjoyed at all, as privileges, were claimed as inherent rights, only surrenderable by the people, or subject to limitation by them by fundamental law.* There the standard was reared of a new era, one of inherent rights, instead of sovereign graces. To emphasize and make that clear it was declared that all men are ‘endowed with certain inalienable rights,’ specifying some, but not attempting to specify them all.

"The word 'inalienable' was, doubtless, not used in the strict sense, because some rights referred to were commonly parted with or modified by consent. Appreciating that, doubtless, in most constitutions, ours (Wisconsin) included, the term 'inherent' was substituted for inalienable, to denote, more accurately, the functional character of rights of members of a community in an unorganized state."

In discussing the right of the citizen to vote, the Court said on page 1045:

"That the right, in the beginning, here to participate in governmental affairs by reasonable exercise of the elective franchise, was inherent, within the meaning of the fundamental declaration in the Bill of Rights, seems pretty plain. Not inherent in the sense of inalienable and inseparable from the individual. Not natural in one view, but, inherent in the same sense as the right of self-defense and the right to acquire hold and transmit property are. *Thus, it is conventional in the sense other rights are which are in their nature absolute till surrendered or limited by consent, express or implied.* It is not natural in the sense that it is so absolute and functional as to be inseparable and not surrenderable."

\* \* \* \*

"It is often said by elementary writers that the right to vote is not a natural right; that it is a mere privilege which may be granted or *not*, or granted upon condition and when granted taken away or modified, all according to the discretion of the law-making power in the absence of express constitutional inhibition to the contrary. Few are found who have ventured to challenge the doctrine that the right to vote is more than a mere legislative privilege in the absence of a grant



in the fundamental law, which may not be strictly correct as it is generally understood.

“The idea that the right to vote is no more than a mere privilege was announced early as a justification for legislative interference therewith, and has been unqualifiedly reiterated over and over again and with growing emphasis as such interferences have progressed in severity. Thus it was said by a divided court in *Healey vs. Wipe, etc.*, 22 S. D. 343, 117 N. W. 521. ‘The election franchise is not a natural right. It is a privilege which may be taken away by the power that conferred it; and the only limitations upon the power of the Legislature to regulate its exercise and enjoyment are the express limitations found in the federal and state Constitutions’.

“The history of the subject shows that the idea is of foreign origin. It existed here prior to the Revolution under our then borrowed system. It is a relic of the old world systems. Thus it will be seen in *Friesleben vs. Shallcross*, 9. Houst. (Del.) 1, Atl. 576, the court reasons from the prevailing ideas and conditions prior to 1776.

*“The difficulty seems to have been in failing to distinguish between fundamental limitations which the people, in forming a government, may place upon a right and the creation of the right itself. So the idea took root that,—the change from the old to the new system marked by the Declaration of Independence, the basic features of which have been incorporated into every written constitution in this country and in none more significantly than our own,—did not change the nature of those things which had been commonly the subject of unbridled legislative interference, as if they were the mere creatures of sovereign authority. So the idea persisted that the right in question, like the right to inherit and transmit property upon the death of its*

possessor, was in no sense a natural or inherent right. Such idea has been reiterated over and over again and only been, if at all, doubtfully referred to now and then."

In *Nunenacher vs. State*, 129 Wis. 190, 108 N. W. 627, the question considered was whether or not the right to take property by will or inheritance was a statutory right. On this question, the court said, on page 628:

"The fallacy of the idea that the government creates or withholds property rights at will is very apparent. *Under our system the government is the creature of the people, the product of a social compact. The people in full possession of liberty and property come together and create a government to protect themselves, their liberty and their property. The government which they create becomes their agent; the officers their servants.* Under the theory of the North Carolina court these agents, in turn, create property rights and confer them upon their creators, who possessed these rights long before. The people create an agency to protect their existing rights which assumes to confer or withhold these same rights. But the question is chiefly historical. From the historical standpoint the idea that all rights of property and rights to transmit the same by inheritance or will have their origin in the positive enactments of law by an established government cannot stand the test. Governments have, indeed, from the earliest times, regulated the exercise of these rights, prescribed ways and forms for their exercise, and protected them by positive law; and so they do now. *From this universal exercise of the right of regulation the idea of governmental right to create and destroy may have arisen, but it seems more likely to have arisen from failure to keep in mind the radical difference between our republican theory of the origin of government and the European medieval theory. Our theory is*

*that the people, in full possession of inalienable rights, form the government to protect those rights. The medieval idea was that the government was sent down from above, and that from its rights and privileges were allowed to flow in gracious streams to the people, who otherwise would not possess them.*

“That there are inherent rights existing in the people prior to the making of any of our Constitutions is a fact recognized and declared by the Declaration of Independence, and by substantially every state Constitution. Our own Constitution says in its very first article: ‘All men are born equally free and independent and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights governments are instituted among men deriving their just powers from the consent of the governed.’ Notice the language, ‘to secure these (inherent) rights governments are instituted;’ not to manufacture new rights or to confer them on its citizens, but to conserve and secure to its citizens the exercise of pre-existing rights. It is true that the inherent rights here referred to are not defined but are included under the very general terms of ‘life, liberty and the pursuit of happiness.’ It is relatively easy to define ‘life and liberty,’ but it is apparent that the term ‘pursuit of happiness’ is a very comprehensive expression which covers a broad field. Unquestionably this expression covers the idea of the acquisition of private property; not that the possession of property is the supreme good, but that there is planted in the breast of every person the desire to possess something useful or something pleasing which will serve to render life enjoyable which shall be his very own, and which he may dispose of as he chooses, or leave to his children or his dependents at his decease. To deny that there is such universal desire, or to deny that the fulfillment of this desire contributes to a large degree to the attainment of human happiness is to deny a fact as patent as

the shining of the sun at noonday. And so we find that however far we penetrate into the history of the remote past, this idea of the acquisition and undisturbed possession of private property has been the controlling idea of the race, the supposed goal of earthly happiness. From this idea has sprung every industry, to preserve it governments have been formed, and its development has been coincident with the development of civilization. And so we also find that, from the very earliest times, men have been acquiring property, protecting it by their own strong arm if necessary, and leaving it for the enjoyment of their descendants; and we find also that the right of the descendants, or some of them, to succeed to the ownership has been recognized from the dawn of human history. The birthright of the first born existed long before Esau sold his right to the wily Jacob, and the Mosaic law fairly bristles with provisions recognizing the right of inheritance as then long existing, and regulating its details. The most ancient known codes recognize it as a right already existing and Justice Brown was clearly right when he said, in *U. S. vs. Perkins*, 163 U. S. 625, 41 L. Ed. 287: 'The general consent of the most enlightened nations has from the earliest historical period recognized a natural right in children to inherit the property of their parents'."

*The right to study any language is a "natural right." The state did not create or grant the right to use language. The right to study and use language is one of the inherent rights referred to in the Declaration of Independence. The right to communicate with others through the spoken word is an inalienable right.*

## PUBLIC SCHOOLS.

When the Federal constitution was written there was not a public school in the United States. Education was then, as it had been for centuries in practically every civilized country, under private control. All schools were private and were maintained by those who patronized them. This applied not only to higher schools of learning, but also to the elementary and primary schools.

A few free schools existed in Massachusetts prior to the adoption of its constitution in 1780. Governor George Clinton in 1795 made a recommendation, as governor, that a common school system be adopted in New York. In 1797 a free school for negroes was founded in the city of New York. A free school for white children was founded in that city in 1801. The plan of supporting schools by levying taxes was first adopted in Massachusetts in 1800. The plan of having public free schools was started about 1800. History shows that about the same time America started maintaining free schools, England and some of the nations in continental Europe began to maintain free schools.

The common school system as we now have it was outlined by Horace Mann in 1837, and later on was enacted into law by the state of Massachusetts, and from then on it spread over the whole country.

The creation of public schools was not for the purpose of giving the state control of the subject of education. Its first object was to aid in the matter of educating the youth of our country. It was to supplement and assist the citizen in educating his children. It was to induce the people to make their private schools more efficient and useful. There

was no thought when public schools were first created of compelling children to attend public schools. The first compulsory school law was passed in Massachusetts in 1852. Its purpose was to compel parents to send their children to school. Not to the public school, to either a private or a public school. This exercise of the police power was to compel parents to give their children an opportunity to receive an elementary education.

The act in question is based on the assumption that because the state has the power to pass a compulsory school law that this gives the state complete control over the subject of education, and therefore, the state has the right and power to direct and control what shall be taught and what shall not be taught, not only in public schools, but also in private schools.

The exercise of the police power to compel parents to send their children to a primary school is a very different situation, than it is to use this police power to prohibit a parent from maintaining a private school or to prohibit a child from studying a foreign language in a private school.

If the act in question is a valid exercise of the police power, then the state has the right to abolish all private schools and require all children to attend the public schools. If the state has complete control of the subject of education, it can prescribe what courses of study, shall be pursued by those who shall attend public schools. It can make a course of study mandatory and prohibit the study of any subject not in the prescribed course of study.

Complete state control of education means community control. It means that we will socialize and nationalize the

subject of education. It will take from the citizen the right to control and direct the education of his child and turn it over to community control.

Applying the plan of the socialists to the important subject of education denies the individual liberty that is guaranteed by our constitution. The citizen has an inherent and an inalienable right to supervise, direct and control the education of his child. This includes the right to maintain private schools in which to teach his children. The state has no more power to forbid the study of an innocent and harmless subject than it has to forbid the child to eat a particular kind of food. If the state of Nebraska has power to prohibit the study of German in a private school, it can prohibit this same child from eating sauerkraut or weiner-worsts.

If the state has the power to socialize and control the entire subject of education, it can do the same thing over the home life of the citizen. It is a short step from prescribing and making exclusive a course of study in our schools to the making of an exclusive bill of fare to be used in our homes. If the state has the power to take complete control of the subject of education and do as the Spartans and Prussions did,—make the children the wards of the state,—the United States will be a dreary place in which to live, and liberty will be only a name.

*The purpose of constitutional government is to preserve and protect the individual rights of the citizen. The constitution protects him in his right to own and use individual property—to have an individual home and to have sufficient individual liberty to study any useful subject.*

Justice Bradley in discussing the effect of the 14th Amendment said in the Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835:

“The 1st section of the 14th Amendment, which is the one relied on, after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that ‘No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’ It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment. It has a deeper and broader scope. *It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.*”

It is difficult to conceive of a right more inherent or more inalienable than the right to study, unless it would be the right of parents to maintain a private school at their own expense in which to educate their children in the common branches, and to use this school to assist them in teaching religion and morality to their children. If there is an inherent and an inalienable right that is beyond the reach of the police power, it is the right of a parent to control and direct the education of his child.

### **PRIVATE SCHOOLS.**

The intervenor and the plaintiffs herein have valuable property rights in these private schools. Having these



property rights in any other private property. The fact arbitrary exercise of the police power. Neither can they be deprived of this property by the enactment of regulations that will have the effect of prohibiting them from freely using their own property. The state has no right to deny or deprive educational institutions of their property rights. The property rights in private schools are the same as the property rights in any other private property. The fact that school property is devoted to a useful and necessary public purpose is an additional reason why those who have donated it should not be deprived of the property, or be made the victims of arbitrary and unreasonable regulations.

In discussing the property right in private educational institutions Judge Bradbury, in *State vs. Neff*, 52 Ohio State, 375 28 L. R. A. 409, said on p. 413:

“We have seen that the statute under consideration has taken from the control and management of the Cincinnati College all of its property and placed it under the control and management of the University of Cincinnati. One ground, as we understand the argument of counsel, upon which this result is maintained to be lawful, is that the purpose to which this property was devoted by its original donors is a public purpose, and that that circumstance alone is sufficient to impress upon the property a public character; but if that is not so, yet as the purpose of the donors was not private gain, but public charity, and as the property under the new corporation would be applied to the same purpose to which the Cincinnati College would have applied it, had the latter continued its administration, that therefore, no substantial right, either of the original donors or of the corporation, was violated by the law.”

“The results of establishing this doctrine would be to place every elementary corporation within the state whether religious, education, or created to administer to the wants of the suffering or needy, beyond the limits of constitutional protection. Whenever, in the opinion of a majority of the general assembly, the public interest, or the interest of two or more colleges, or churches, or other private eleemosynary corporations, required them to be united, the property of one or more of them could be seized and transferred to another. The doctrine finds no support in any treatise or adjudication within our knowledge, nor by reason of justice. There are two classes of public charities, one where the institutions are public in the broadest sense of that term, that is they are owned by the state, or some subdivision thereof created for governmental purposes, and maintained at the public expense. These institutions are absolutely under the control and management of the public through its proper representatives. As respects them no vested or private rights pertain. It does not follow, however, that because this class of public charitable institutions are the subjects of absolute public control, that another class, whose property consists of private donations and to which the organized public has contributed nothing, shall also be subjected to such absolute governmental control because the charity they administer has been christened a ‘public charity in legal nomenclature. In common acceptance colleges are not ‘charitable institutions’ although in law they administer a public charity. This means no more than that the public are incidentally benefited by the education of some of its members, the immediate advantage accruing to the individual members who have received instruction.

“The unbroken current of authority declares that the property of such institutions is private property, and the corporations themselves private corporations. *Dartmouth College Trustees vs. Woodward*, 17 U. S.

4 Wheat. 518, 4 L. ed. 629; Vincennes University Trustees vs. Indiana, 55 U. S. 14 How. 269, 14 L. ed. 416; Yarmouth vs. North Yarmouth, 34 Me. 11, 56 Am. Dec. 666; Belfast Academy Trustees vs. Salmond, 11 Me. 114; Den. vs. Foy, 5 N. C. 58; State vs. Adams, 44 Mo. 570; Downing vs. Indiana State Board of Agriculture, 129 Ind. 443; Illinois Board of Education vs. Greenebaum, 39 Ill. 609; Illinois Board of Education vs. Bakewell, 122 Ill. 339; Montpelier Academy Trustees vs. George, 14 La. 395."

In *Columbia Trust vs. Lincoln Institute*, 138 Ky. 804, 129 S. W. 113, 29 L. R. A. (N. S.) 53, the supreme court of Kentucky held that the voters could not prohibit the establishment, within the county limits, by a private charitable corporation, of an industrial school for colored children. In discussing this question, Chief Justice Baker said:

"It is useless to multiply authorities on so obvious a proposition. *If the teaching of the young to be useful, upright, Christian citizens is not inimical to the public safety, public morals, or the public health, then it must follow that an act which seeks either to prohibit it altogether, or to authorize others to prohibit it, must be invalid. It is difficult to find language to make plainer that which is so obvious as is the proposition before us. The purposes of the institution under discussion include the whole circle of the solid virtues of which youth may be endowed. Undoubtedly, it is a substantial good to educate the youth of the state; and such is the declared policy of the Constitution. Section 183 provides: 'The general assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state.' It cannot, then, be in any way injurious to the public to aid in forwarding the great educational policy which the people themselves have declared in their fundamental*

law,—the giving of every young man and woman in the commonwealth a sound education. And when academic education is supplemented by religious training and special instruction in the agricultural and mechanical arts and sciences, it seems to us that it is contrary to the most obvious public policy that an institution which affords such an education should be in any way blocked or impeded. What good reason can be given for prohibiting the exercise of such a charity as that which we have under discussion unless it can be shown that education, supplemented by religious training, may be in some way evil to society? Does not the mind of every virtuous and right-thinking person at once admit that the contrary is true? *Do we not know that religious educational training has a tendency to make men more industrious, more virtuous, and better generally, morally, and physically? In other words, better, wiser, and more useful citizens. What would be thought of an act which prohibited the former from cultivating a piece of land greater than 75 acres, without the permission of his neighbors?... By what argument could an act be supported which prohibited a manufacturer from working more than a given number of artisans? And yet it is seriously contended that a school which seeks to make religious, upright, educated citizens may be prevented under the police power of the state as a public nuisance. Education strengthens the mind, purifies the heart and widens the horizon of thought. It magnifies the domain of hope, multiplies the chances of success in life and opens wide the door of opportunity to the poor as well as to the rich. It makes men better husbands, better fathers, and better citizens. It is not doubted that the legislature under the police power, may regulate education in many respects. It may prohibit the mingling of white and colored children in the same schools or in schools of immediate proximity. Perhaps, it may be within the police power to prohibit co-education of the sexes, or to, in any other reasonable way regulate the mere manner of educating the*

*youth of the state; but to arbitrarily prohibit education is in direct violation of the Bill of Rights above quoted.*

In the case of Berea College vs. Com. 123 Ky. 209, it was held, that it was within the power of the legislature to prohibit the voluntary mingling of white and colored students in the same school, it was not within its competency to prohibit schools for white and colored students from being conducted within 25 miles of each other; it being there held that such a prohibition was an arbitrary exercise of power, which could not be upheld in a constitutional form of government. \* \* \* \*

“We conclude, then, on this branch of the case that religious and scientific education, instead of being in any wise injurious or dangerous to the public safety, morals, health or welfare, on the contrary, is promotive of public virtue, intelligence, and good citizenship, and is therefore to be desired and promoted, rather than prohibited or impeded; and this being true, the act under discussion, which puts it within the power of the voters of any precinct to prohibit the establishment of such a school as that contemplated by appellee, is unconstitutional, and therefore void.”

In Berea College vs. Commonwealth of Kentucky, 211 U. S. 45, 53 L. ed. 81, the question passed on by this court was the right of the legislature to pass an act prohibiting domestic corporations from teaching white and negro children in the same institution. This court held that the state had power to limit the right of corporations, created by it to teach. Justice Brewer said, on p. 53:

“Besides, appellant, as a corporation, created by this state, has no natural right to teach at all. Its right to teach is such as the state sees fit to give it.

The state may withhold it altogether, or qualify it." The inference in the opinion is that the state did not have the power to prevent individuals from teaching, for the individual would have a natural right to teach. The court declined to pass on the question as to whether or not the state had a right to make it a crime to maintain or operate a private institution of learning where black and white children were received at the same time for instruction. In discussing this question, Justice Harlan in his dissenting opinion, said on page 67:

"In my judgment the court should directly meet and decide the broad question presented by the statute. *It should adjudge whether the statute, as a whole is or is not unconstitutional, in that it makes it a crime against the state to maintain or operate a private institution of learning where white and black pupils are received, at the same time, for instruction.* In the view which I have as my duty I feel obliged to express my opinion as to the validity of the act as a whole. *I am of the opinion that, in its essential parts, the statute is an arbitrary invasion of the rights of liberty and property guaranteed by the 14th Amendment against hostile state action, and is, therefore, void.*

"*The capacity to impart instruction to others is given by the Almighty for beneficent purposes; and its use may not be forbidden or interefered with by government,—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property,—especially, where the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States.*

This court has more than once said that the liberty guaranteed by the 14th Amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways.' *Allegeyer vs. Louisiana*, 165 U. S. 578, 41 L. ed. 832. If pupils, of whatever race,—certainly, if they be free citizens,—choose, with the consent of their parents, or voluntarily, to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether Federal or state, can legally forbid their coming together, or being together temporarily, for such an innocent purpose. If the commonwealth of Kentucky can make it a crime to teach white and colored children together at the same time, in a private institution of learning, it is difficult to perceive why it may not forbid the assembling of white and colored children in the same Sabbath school, for the purpose of being instructed in the Word of God, although such teaching may be done under the authority of the church to which the school is attached as well as with the consent of the parents of the children. So, if the state court be right, white and colored children may even be forbidden to sit together in a house of worship or at a communion table in the same Christian church. In these cases supposed there would be the same association of white and colored persons as would occur when pupils of the two races sit together in a private institution of learning for the purpose of receiving instruction in purely secular matters. *Will it be said that the cases supposed and the case here in hand are different, in that no government, in this country, can lay unholy hands on the religious faith of the people? The answer to this suggestion is that, in the eye of the law, the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the*

*public.* The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law. *Again, if the views of the highest court of Kentucky be sound, that commonwealth may, without infringing the Constitution of the United States, forbid the association in the same private school of pupils of the Anglo-Saxon and Latin races respectively, or pupils of the Christian and Jewish faiths, respectfully. Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinction between such citizens in the matter of their voluntary meeting for innocent purposes, simply because of their respective races?* Further, if the lower court be right, then a state may make it a crime for white and colored persons to frequent the same market places at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature, in which all citizens, without regard to race, are equally interested. Many other illustrations might be given to show the mischievous, not to say cruel, character of the statute in question, and how inconsistent such legislation is with the great principle of the equality of citizens before the law.

*“Of course, what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the state and maintained at the public expense. No such question is here presented and it need not be now discussed. My observations have reference to the case before the court, and only to the provision of the statute making it a crime for any person to impart harmless instruction to white and colored pupils together, at the same time, in the same private institution of learning. That provision is, in my opinion, made an essential element in the policy of the statute, and, if regard be had to the object and pur-*



pose of this legislation, it cannot be treated as separable nor intended to be separated from the provisions relating to corporations. The whole statute should therefore be held void; otherwise, it will be taken as the law of Kentucky, to be enforced by its courts, that the teaching of white and black pupils, at the same time, even in a *private* institution, is a crime against that commonwealth, punishable by fine and imprisonment."

## THE CONSTITUTION SHOULD PROTECT PRIVATE EDUCATION.

Section 4 of Art. I of the Bill of Rights of Nebraska is as follows:

"All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect, or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. *Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.*"

The last sentence quoted above is taken from the Ordinance of 1787 which created the Northwest Territory. At the time those words were included in that ordinance, there were no public schools in the proposed Northwest Territory, or in the United States. The schools referred to therein are *private schools*, the *means of instruction* referred to therein is *private instruction* given by private teachers.

The right of the state to maintain an educational system is unquestioned. It has power, under different provisions in the constitution, to create and maintain a public school system. It does not have power to make a public

school system exclusive or to prohibit private schools. The right of the individual citizen to educate his child in a private school is a constitutional right that can not be taken away by the police power. The constitution prevents the legislature from interfering with private education. The legislature has no power to prohibit the teaching of a useful subject in a private school. Not only is it prohibited from doing this, but the constitution directs the the legislature *to encourage schools and means of instruction*. Instead of the state having the power to prohibit, there is a mandatory provision in the constitution which requires it acting through the legislature, *to encourage private schools and private instruction*.

Parochial schools are a part of the religious life of Catholics and Lutherans. These schools are built, maintained and supported for the purpose of giving instruction in religion and morality, in addition to the regular course of study in the secular branches. Teachers in these parochial schools have the same qualifications as the teachers in the public schools. The course of study is substantially the equivalent of the course of study in the public schools. In addition to this course of study, instructions are given in religion and morality. These parochial schools are to supplement the religious training given to the children in their homes by their parents. Naturally, if a foreign language is used in the home as a medium of communication, this same language can be used to advantage in a parochial school to assist the child in learning the English language and also as a medium through which it receives instruction until it is able to understand the English language. If the language used by a mother in the home is German, or any other foreign language, it naturally follows that the mother,

in giving religious instruction to her child, uses that language. To prevent the parochial schools from using this same language to instruct this child is to deny the equal protection of the laws to the children that happen to live in foreign language homes.

The mother who speaks English gives religious instruction to her child in the English language. That mother has a right to have this work supplemented in a private school in the English language. The mother who gives instruction to her child in Polish in the home, has the same right as the mother who speaks English, to have her child instructed in the language of the home, Polish, in a private school.

The children of the intervenor Siedlik can not receive instruction in St. Francis school until they have sufficient knowledge of the English language to receive instruction in that language. This fact was established at the trial without conflict. It is admitted in the brief of the state that the child cannot receive religious instruction in the school in any language but English. It has been proved, without conflict, that one of the Siedlik children lost a year's schooling because the teachers in that school, after the law under consideration was passed, did not use Polish as a means of communicating with the child.

Citation of court decisions and arguments are not necessary to prove that children who use the Polish language exclusively in their homes, and know no other language in their home life, can make little progress in a school where the instruction is confined exclusively to English. Common sense and sensible administration suggest both the propriety and the necessity of using whatever means of com-

munication are open to these children. To prohibit from using the language of the home in a private school is not only unconstitutional, but is tyrannical.

The state has admitted in its brief that the law in question does prevent the giving of religious instruction in private schools, to those who do not understand the English language. This admission in itself is sufficient reason why the act under consideration should be declared unconstitutional.

### **POLICE POWER VS. THE CONSTITUTION.**

The founders of our government had a definite idea of their citizenship. They planned to protect the natural and inherent rights of the citizen by a written constitution. They thought that in the United States men would be freer than elsewhere. They had a dislike for any system which marked a man superior to another, in spite of character, qualifications and attainments. They were opposed to the European theory of government that made the citizen a government ridden vassal. Their conception was that the prime purpose of the state was not to take rights away from the citizen, but rather to protect him in his rights, even as against those who happened to be administering the government. Their plan was to govern as little as possible.

In the beginning, a decent, honest citizen had no law and no government to bother him. He was free to live his life in his own way. He had freedom of thought, freedom of the person, and freedom in his home. He could study whatever pleased or interested him and say whatever he desired on any subject at any time or place. He

was a free man and he thought that his liberty was the distinctive feature of the citizenship of this country. His liberty meant more than the privilege of agreeing with the majority. He understood that it was this liberty that made our country the asylum for all those who had been denied these fundamental rights in other parts of the world.

As soon as the fathers created constitutional liberty, the legislative branch began to limit and take it away through the exercise of the police power. Acts *mala in se* were such when the constitution was written. As a rule these acts were wrongs before the state declared them to be such. They were violation of the divine and natural law.

Acts *mala prohibita* are the result of legislative activity. By the exercise of the police power, innocent and harmless acts are made unlawful. Most of these police regulations deprive the citizen of liberty; as a rule, they are passed without regard to public sentiment and therefore cannot be enforced. Because of this, America has failed to properly and efficiently enforce its criminal laws.

While we have failed to effectively enforce our criminal laws, against real crimes,—acts *mala in se*,—our congress, every state legislature, every city council, every village board, and every other body that has express or implied power to legislate is busy devising ways to make innocent and innocuous acts unlawful.

The demagogue is busy suggesting to the ignorant and thoughtless that our courts, should not exercise the power of declaring legislative acts unconstitutional. It is sug-

gested that the legislative act is the voice of the people. It is assumed that America speaks only through its legislative and executive branches. The thoughtless overlook the fact that the courts were created by the people, in the same way as the other co-ordinate branches of the government. The courts are as much the voice of the people as are the other branches of government. When the court declares a legislative act unconstitutional, the people speak through the court,—the people express themselves through the only agency ever created by them, and given power to interpret and pass on the constitutionality of legislation.

It is well within the facts to say that the clamor against the right and power of courts to nullify legislative acts because of their unconstitutionality, has had an effect on the courts. The opinions disclose that the courts have been busy finding new reasons and making ingenious arguments to sustain legislation. Some courts have even gone to the extreme limit of declaring that the wisdom, policy and reasonableness of police regulations is exclusively a legislative question. In many cases, the opinions in which acts have been declared unconstitutional take the form of an apology. The trend of affairs is such that there is substantial reason to ask the question that was propounded by Justice McKenna in *Block vs. Hirsh*, 256 U. S. 135, 163; 65 L. ed. 865, 874:

“Has it (the constitution) suddenly become weak—become not a restraint upon evil government, but an impediment to good government? Has it become an anachronism, and is it to become ‘an archaeological relic,’ no longer to be an efficient factor in affairs, but something only to engage and entertain the studies of antiquarians?”

## LIBERTY AND PROPERTY.

The act in question is based on the theory of state paternalism,—that medieaval doctrine that proposes to effect the social and individual elevation of man by restraining him from exercising freedom over the education of his children. It assumes that the citizen is a sort of half infant, who must be guarded and led along, in order that he may not injure the state. The act in question does not benefit any individual. It is not claimed that the study of a foreign language in a private school will injure or cause damage to anyone. This act prohibits children from studying a language at the time of life when they can learn it most easily. Just how the state will be benefited by prohibiting the study of foreign languages below the eighth grade and permitting the study of these languages above the eighth grade in our schools has not been explained. Probably the reason is the same as that given by the Pharaohs of ancient Egypt, when they required their subjects "to make bricks without straw."

The liberty guaranteed by the 14th amendment has been held to protect against state denial; the right of an employer to discriminate against a workman because he is a member of a trade union (*Coppage vs. Kansas*, 236 U. S. 1, 59 L. ed. 441); the right of a business man to conduct a private employment agency (*Adams vs. Tanner*, 244 U. S. 590, 61 L. ed. 1336); the right to contract, outside the state, for insurance on the property of a citizen (*Allgeyer vs. Louisiana*, 165 U. S. 578, 41 L. ed. 832). In each of the foregoing, the state legislature deemed the proposed legislation as necessary and not inimical to the public welfare. These acts were declared unconstitutional because they



interfered with the liberty of the citizen in the matter of making contracts regarding his property and his property rights.

In comparison, freedom of the person and freedom of the mind,—liberty in its most comprehensive sense,—is more important than the right to own and use property. Of what avail is the liberty of the person and the possession of property, if the state places fetters on the human mind? The provisions of the 14th amendment not only guarantee liberty to use and own property and to be free from physical restraint, but also mental liberty.

Respectfully submitted,

ARTHUR F. MULLEN,  
*Attorney for Plaintiffs in Error.*

Omaha, Nebraska,  
February 14, 1923.

I. L. ALBERT,  
C. E. SANDALL,  
*Of Counsel.*

**END**

**OF**

**CASE**

**BARTELS v. STATE OF IOWA.**

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

**BOHNING v. STATE OF OHIO.****POHL v. STATE OF OHIO.**

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

**NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO, AND OTHER STATES, ET AL. v. McKELVIE ET AL., ETC.**

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

Nos. 134, 181, 182, 440. Argued October 10, November 28, 1922, and February 23, 1923.—Decided June 4, 1923.

Decided upon the authority of *Meyer v. Nebraska*, ante, 390. 191 Ia. 1060; 102 Oh. St. 474; 187 N. W. 927, reversed.

ERROR, (1) to a judgment of the Supreme Court of Iowa, sustaining a conviction of a teacher for teaching German to pupils in a parochial school, below the eighth grade; (2) to like judgments of the Supreme Court of Ohio; (3) to a judgment of the Supreme Court of Nebraska reversing a decision of a trial court, and refusing an injunction, in a suit brought against state officials to prevent enforcement of a statute penalizing the teaching of foreign languages to young children in schools.

*Mr. Frank E. Farwell*, with whom *Mr. Charles E. Pickett*, *Mr. Benjamin F. Swisher*, and *Mr. Fred B. Hagemann* were on the briefs, for plaintiff in error in No. 134.

*Mr. Bruce J. Flick*, for defendant in error in No. 134, submitted. *Mr. Ben J. Gibson*, Attorney General of the State of Iowa, was also on the brief.

Plaintiff in error cannot insist that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case he presents the effect of applying the statute is to deprive him of his property without due process of law. *Davidson v. New Orleans*, 96 U. S. 97; *New York & North Eastern R. R. Co. v. Bristol*, 151 U. S. 566, 570.

The constitutionality of the statute cannot be assailed without showing that the party questioning it has been deprived of property or liberty in some arbitrary way; because some other person might be thus affected, he is not authorized to ask the court to invalidate a law on questions of constitutionality which do not directly affect him.

The constitutionality of acts like the one in question has been upheld in: *Nebraska District Evangelical Synod v. McKelvie*, 104 Neb. 93; *Pohl v. State*, 102 Oh. St. 474; *State v. Bartels*, 191 Ia. 1074; *Castello v. McConico*, 168 U. S. 680; *Tyler v. Judges*, 179 U. S. 410; *Strouse v. Foxworth*, 231 U. S. 162.

The language of the statute does not violate Art. I, § 3, of the state constitution prohibiting the free exercise of religion. The defendant is not being prosecuted for giving religious instruction in a foreign language. *Commonwealth v. Herr*, 229 Pa. St. 132.

When the law operates equally upon all, when the rule of conduct is uniform throughout the State, presumption lying at the foundation of representative government is that the legislator will act wisely and in the interest of all of the people. Such legislation is not open to the objection that it is class legislation. *Viermaster v. White*, 179 N. Y. 235; *Patson v. Pennsylvania*, 232 U. S. 138; *Northwestern Laundry v. Des Moines*, 239 U. S. 486; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61; *Booth v. Illinois*, 184 U. S. 425; *Adams v. Milwaukee*, 228 U. S.

572; *State v. Fairmont Creamery Co.*, 153 Ia. 702; *Bopp v. Clark*, 165 Ia. 697; *Hunter v. Coal Co.*, 175 Ia. 245.

In determining the reasonableness of a police regulation, the legislature is at liberty to act with reference to established usages, customs, and conditions of the people and with a view to the promotion of their comfort and the preservation of the public peace and good order. *Plessy v. Ferguson*, 163 U. S. 550; *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 556, 559.

It will be presumed that the legislature in passing this statute was familiar with existing conditions, and that no general laws are ever passed either through want of information on the part of the legislature or because it was misled. *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 363.

Courts do not sit in judgment upon the wisdom of legislative enactments.

*Mr. Timothy S. Hogan* and *Mr. Frank Davis, Jr.*, for plaintiffs in error in Nos. 181 and 182.

*Mr. E. J. Thobaben*, with whom *Mr. Edward C. Stanton* was on the brief, for defendant in error in Nos. 181 and 182.

The legislature has the right, more than that, the duty, of providing adequate means of education of the young. It surely has the right to prescribe the course of study which shall be taught. In § 7648 of the Code of Ohio, the legislature has named the subjects which shall be taught in and which shall constitute a school an elementary school. Having defined what shall be taught, and clearly having the right to so define, has not the legislature a correlative right to say what shall not be taught, and the language in which the teachings shall be conducted?

Experience has shown that it is not wise to keep a young child or one that would be a student in the ele-

mentary branches in attendance on school more than forty weeks out of fifty-two. It has also demonstrated that it requires at least thirty weeks in any one year to impart the knowledge necessary in certain essential studies. The legislature of Ohio has therefore enacted laws fixing the maximum and minimum length of attendance in elementary schools in any year, and prior to the enactment of the legislation complained of herein had attempted only to say what branches of knowledge should be taught.

Sections 7762-1 and 7762-2 of the General Code are elements of the compulsory educational law, and by their natural effect operate to prohibit spending any of the time deemed essential to acquiring knowledge in the branches which are affirmatively prescribed by teaching a language not deemed essential to good intelligent citizenship in the State of Ohio.

Section 7762-2 applies this same rule to private, institutional and parochial schools. It is as essential that pupils in these schools should receive standard educational facilities as those who attend the public schools. The objective, intelligent citizenship, is the same, and it cannot be said that, because a child attends a private school or a parochial school, the standard of its educational requirement should be any less than is required of a pupil in the public schools.

The only remaining question is that § 7762-2 provides that the teaching shall be conducted in the English language only. We think that this is clearly within the right of a legislature in an English speaking country; to say otherwise would create conditions chaotic in the extreme, with results that are unthinkable.

Much is said about personal rights, liberty, equality, privilege, due process of law, poison virus, etc. These questions are not involved in the law complained of. The

first duty of society to itself is to see to it that the elements which compose society have the essentials of good citizenship. This is paramount to any whim or notion that any person or set of persons may have. No religious liberties are interfered with by the act in question. If a parent wishes his child taught Martin Luther's dogma in Martin Luther's language, there is no law against the child being taught that language, unless it takes so much of the child's time and health as to endanger society in that regard, nor does the act complained of interfere with any substantial right under the Constitution. It does not interfere with religious liberty, nor does it abridge any privilege or immunity, nor deprive any person of life, liberty or property, nor does it deny to any person equal protection of the laws. It is a reasonable regulation, having for its objective the highest purpose of government, the upbuilding of an intelligent citizenship, or as said by Chief Justice Fuller in *Giozza v. Tiernan*, 148 U. S. 657-662, it tends to promote "their health, morals, education and good order."

It certainly is within the province of the legislature to enact laws protective of patriotism and the war power of the country.

*Mr. Arthur F. Mullen and Mr. C. E. Sandall*, with whom *Mr. I. L. Albert* was on the briefs, for plaintiffs in error in No. 440.

*Mr. Mason Wheeler and Mr. O. S. Spillman*, with whom *Mr. Clarence A. Davis*, Attorney General of the State of Nebraska, *Mr. Charles S. Reed*, *Mr. Guy C. Chambers* and *Mr. Hugh La Master* were on the brief, for defendants in error in No. 440.

*Mr. William D. Guthrie and Mr. Bernard Hershkopf*, by leave of court, filed a brief as *amici curiæ*.

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

The several judgments entered in these causes by the Supreme Courts of Iowa, Ohio and Nebraska, respectively, must be reversed upon authority of *Meyer v. Nebraska*, decided today, *ante*, 390.

Number 134. Plaintiff in error was convicted of teaching pupils in a parochial school below the eighth grade to read German contrary to "An act requiring the use of the English language as the medium of instruction in all secular subjects in all schools within the State of Iowa," approved April 10, 1919.<sup>1</sup> He used English for teaching the common school branches, but taught young pupils to read German. The Supreme Court of the State held: "The manifest design of this language statute is to supplement the compulsory education law by requiring that the branches enumerated to be taught shall be taught in the English language, and in no other. The evident purpose is that no other language shall be taught in any school, public or private, during the tender years of youth, that is, below the eighth grade." 191 Iowa, 1060.

Numbers 181 and 182. Bohning and Pohl, of St. Johns Evangelical Congregational School, Garfield Heights, Cuyahoga County, Ohio, were severally convicted (102

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<sup>1</sup> Section 1. That the medium of instruction in all secular subjects taught in all of the schools, public and private, within the State of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited, provided, however, that nothing herein shall prohibit the teaching and studying of foreign languages as such as a part of the regular school course in any such school, in all courses above the eighth grade.

Section 2. That any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100.00). [Laws 1919, c. 198.]



Ohio St. 474) of violating "An act to supplement section 7762 of the General Code . . . and to repeal section 7729, concerning elementary, private and parochial schools and providing that instruction shall be in the English language," (108 Ohio Laws 614) approved June 5, 1919,<sup>2</sup> which prohibits the teaching of German to pupils below the eighth grade.

Number 440. An injunction is sought against the Governor and Attorney General of the State and the Attorney for Platte County to prevent enforcement of "An act to declare the English language the official language of this State, and to require all official proceedings, records and publications to be in such language and all school branches to be taught in said language in public, private, denominational and parochial schools," etc., approved April 14,

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<sup>2</sup>Section 7762-1. That all subjects and branches taught in the elementary schools of the State of Ohio below the eighth grade shall be taught in the English language only. The board of education, trustees, directors and such other officers as may be in control, shall cause to be taught in the elementary schools all the branches named in section 7648 of the General Code. Provided, that the German language shall not be taught below the eighth grade in any of the elementary schools of this state.

Section 7762-2. All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct pupils who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of this state, shall be taught in the English language only, and the person or persons, trustees or officers in control shall cause to be taught in them such branches of learning as prescribed in section 7648 of the General Code or such as the advancement of pupils may require, and the persons or officers in control direct; provided that the German language shall not be taught below the eighth grade in any such schools within this state.

Section 7762-3. Any person or persons violating the provisions of this act shall be guilty of a misdemeanor and shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each separate day in which such act shall be violated shall constitute a separate offense. . . .

1921.<sup>3</sup> This statute is subject to the same objections as those offered to the Act of 1919 and sustained in *Meyer v. Nebraska*, *supra*. The purpose of the later enactment, as stated by counsel for the State, is "to place beyond the possibility for legal evasion a prohibition against the teaching in schools of foreign languages to children who have not passed the eighth grade." The Supreme Court considered the merits of the cause, upheld the statute, and refused an injunction. 187 N. W. 927.

McKelvie and Davis, formerly Governor and Attorney General, no longer occupy those offices. The cause is dismissed as to them. Otto F. Walter is now the County Attorney and the judgment below as to him must be reversed.

*Reversed.*

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\*Sec. 1. The English language is hereby declared to be the official language of this State, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denominational and parochial schools.

Sec. 2. No person, individually or as a teacher, shall, in any private, denominational, or parochial or public school, teach any subject to any person in any language other than the English language.

Sec. 3. Languages other than the English language may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county or the city superintendent of the city in which the child resides. Provided, that the provisions of this act shall not apply to schools held on Sunday or on some other day of the week which those having the care and custody of the pupils attending same conscientiously observe as the Sabbath, where the object and purpose of such schools is the giving of religious instruction, but shall apply to all other schools and to schools held at all other times. Provided that nothing in this act shall prohibit any person from teaching his own children in his own home any foreign language. . . .

Sec. 7. Chapter 249, of the Session Laws of Nebraska for 1919, entitled, 'An Act relating to the teaching of foreign languages in the State of Nebraska,' is hereby repealed. . . . [Laws 1921, c. 61.]

HOLMES and SUTHERLAND, JJ., dissenting. 262 U. S.

MR. JUSTICE HOLMES, dissenting.

We all agree, I take it, that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one. The only question is whether the means adopted deprive teachers of the liberty secured to them by the Fourteenth Amendment. It is with hesitation and unwillingness that I differ from my brethren with regard to a law like this but I cannot bring my mind to believe that in some circumstances, and circumstances existing it is said in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching the desired result. The part of the act with which we are concerned deals with the teaching of young children. Youth is the time when familiarity with a language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school. But if it is reasonable it is not an undue restriction of the liberty either of teacher or scholar. No one would doubt that a teacher might be forbidden to teach many things, and the only criterion of his liberty under the Constitution that I can think of is "whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 204. *Hebe Co. v. Shaw*, 248 U. S. 297, 303. *Jacob Ruppert v. Caffey*, 251 U. S. 264. I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried.

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Syllabus.

I agree with the Court as to the special proviso against the German language contained in the statute dealt with in *Bohning v. Ohio*.

MR. JUSTICE SUTHERLAND concurs in this opinion.

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ATLANTIC COAST LINE RAILROAD COMPANY